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DAMAGES FOR WRONGFUL EXPULSION FROM A TRADE UNION: BONSOR *v.* MUSICIANS' UNION

THE decision of the Court of Appeal in *Bonsor* v. *Musicians' Union* [1] has now been reversed by the House of Lords [2] and the consequences of this reversal are of such significance as to justify the fuller treatment of an article rather than a brief description in a case-note.[3] It will be recollected that that case raised the right of a member of a registered trade union to sue the union in its registered name for damages for wrongful expulsion. Incidentally the case also has a considerable bearing on the legal position of unincorporated associations generally, and the decision is therefore of importance not only as extending the protection of individual trade unionists but also as regards members of the many types of unincorporated bodies which flourish in the rather curious limbo to which our legal system relegates them.

In view of the differing views expressed by their Lordships in the House of Lords, it is far from easy to assess the wider implications of this decision and it may therefore be of assistance to begin by reviewing the findings reached in each of the speeches delivered.

Lord Morton decided the appeal on the broad ground that a registered trade union is an entity recognised by the law and distinct from the members thereof. This view was based principally on the case of *Taff Vale Railway Co.* v. *A.S.R.S.*[4] which held that a trade union could be sued in its registered name in tort and for the wrongful conduct of its servants. After reviewing the various expressions of judicial opinion in that case Lord Morton reached the conclusion that it was there established by the majority that the "entity" being sued was something separate and distinct in law from the individual members of the society. "Moreover (said

[1] [1954] Ch. 479. [2] [1955] 3 W.L.R. 788.
[3] The case as it appeared in the Court of Appeal was dealt with in some detail in a lengthy note in (1954) 17 M.L.R. at pp. 360–365. To avoid unnecessary repetition the reader is asked to regard the present article as a sequel to the earlier note by the same writer. [4] [1901] A.C. 426.

Lord Morton) the opposite view gives rise to great difficulties. For instance, the membership of a trade union is constantly changing, as old members die and new members come in. If the suit is to be regarded as having been brought against the individual members, it must have been brought against those who were members at the time when the writ was issued. Yet some of these persons may not have been members at the time when the tort was committed, and the tort cannot have been committed by their agents." [5] Lord Morton rejected the view of Lords Macnaghten and Lindley to the effect that the action against the union was really a representative one, all the members being sued in the registered name. This he regarded as a minority view inconsistent with the later authorities such as *A.S.R.S.* v. *Osborne*,[6] *Amalgamated Society of Carpenters* v. *Braithwaite*,[7] and *N.U.G.M.W.* v. *Gillian*.[8] In Lord Morton's opinion, if the action had been against all the members of the union there was no reason why an order for payment of the amount of the judgment could only be enforced against the property of the union,[9] yet Lord Lindley had expressly recognised that it could only be enforced against the property of the union.[10] It followed, on Lord Morton's view, that the registered union, although not an incorporated body, was capable of entering into contracts and of being sued as a legal entity. In the present case the contract of membership was between the plaintiff and the union as a legal entity and damages were recoverable against the union as such for wrongful expulsion in breach of contract. On this basis *Kelly* v. *N.S.O.P.A.*[11] was wrongly decided.

Lord Porter's speech, broadly speaking, followed the lines of that of Lord Morton. The contract of membership was with the union as such and the union had capacity to contract as a legal entity. The *Taff Vale* case recognised that a registered union was "a thing created by statute, call it what you will, an entity, a body, a near-corporation, which by statute has in certain respects an existence apart from its members." [12] If the expressions used by Lords Macnaghten and Lindley were intended to limit the status of registered trade unions and to imply that the Act merely provided a convenient name for a number of individuals, and that an action against the union in its registered name was equivalent to a representative action against its individual members, Lord Porter could not agree with their view. The learned law lord also pointed out that it was not necessary to determine the exact limits of the powers of a trade union. "It may well be that it does not possess

[5] [1955] 3 W.L.R., at pp. 793–794.
[6] [1910] A.C. 87.
[7] [1922] 2 A.C. 440.
[8] [1946] K.B. 41.
[9] [1955] 3 W.L.R., at p. 794.
[10] See [1901] A.C., at p. 445.
[11] (1915) 84 L.J.K.B. 2236.
[12] [1955] 3 W.L.R., at p. 800.

the full powers of an incorporated body."[13] There was, however, no reason to confine the semi-corporate status of the union to its relations with third parties,[14] for this status was wide enough to embrace its liability to its own members.

Lord MacDermott on the other hand in the lengthiest and in some respects the most interesting speech delivered on the appeal subjected the matter to a much fuller analysis, and while differing from the view that the union was a legal entity distinct from its members, was of opinion that quite apart from this *Kelly's* case was wrongly decided. The reasoning of Lord MacDermott was substantially approved by Lord Somervell and is also reflected in the opinion of Lord Keith; it is therefore to the speech of Lord MacDermott that particular regard has to be paid in order to ascertain the effect of *Bonsor's* case beyond the sphere of trade union law.

The starting point of Lord MacDermott's treatment of the question whether a trade union is a juridical person distinct from its members was a careful consideration of the provisions of the Trade Union Act of 1871. Examination of these led to the conclusion that Parliament did not intend to create a new sort of trade union with a legal personality of its own.[15] It might be right to regard a trade union as an entity in fact but that was no ground for treating it as a *legal* entity as well. Lord MacDermott then examined the judicial utterances in the *Taff Vale* case and reached the conclusion that Lord Brampton alone favoured treating a registered union as a separate legal entity. The other judges in effect recognised the absence of a separate personality and merely decided that Parliament had endowed a registered union with powers and qualities to such an extent as to fix it with corresponding responsibilities enforceable by proceedings in its registered name. The dicta in *Osborne's* case also fell short of imputing full juridical personality to the registered union; they recognise that the legislature had conferred some of the characteristics of a juridical person but not so as to create a legal personality distinct from the membership.

Having thus reached the conclusion that neither the Act of 1871 nor the weight of subsequent judicial authority had treated a registered union as a distinct legal *persona*, Lord MacDermott turned to consider the *procedural* consequences of the *Taff Vale* decision. In his view this case had the important consequence of

[13] *Ibid.*

[14] As was done by the majority decision of the Court of Appeal in *Bonsor*.

[15] The main points regarding the Act of 1871 emphasised by Lord MacDermott were: s. 4 (enumerating agreements which were unenforceable) does not refer to agreements between a union and its members and applies to both registered and unregistered unions alike; there is no provision for incorporation; ss. 7 and 8 provide for property to be vested in trustees and not in the union as an entity; and s. 9 makes provision for proceedings by and against the trustees which would be unnecessary if the union were a juridical person.

removing the difficulty involved in suing a voluntary association with a fluctuating membership. The party suing still has to show that "the union is *as an organised combination* responsible for the act of which he complains; but he does not need to marshal the membership on any basis of individual liability as, for example, by excluding those who are infants or who have joined since his cause of action arose or who, as a minority, have voted in his favour; nor (if a member) has he even to make it clear on the face of the record that he excludes himself."[16] This is the practical and convenient consequence which flows from allowing the union to be sued in its registered name; it also has the result that any judgment obtained can be enforced only against the property of the union and not personally against the members. Lord MacDermott explained this last result on the ground that no procedure is available whereby execution may be levied on individual members in the case of a judgment against the union in its registered name. It is true (he added) that Lord Lindley in *Wise* v. *Perpetual Trustee Co.*[17] expressed the view, in relation to unincorporated clubs, that by their nature a member's liability does not extend beyond his subscription, and Lord Lindley, in denying any personal liability in the case of union members, may have been intending to apply the same principle to a registered union. Lord MacDermott, however, was doubtful whether the opinion of Lord Lindley in *Wise's* case was intended to apply to unliquidated claims and preferred to rest his own view on the procedural difficulty adverted to. The situation where the members are sued by name or by duly appointed representatives raised different and more difficult considerations on which Lord MacDermott refrained from expressing any opinion.

On the footing then that a registered trade union is still no more than an association of individuals and not a juristic person Lord MacDermott went on to examine the reasoning in *Kelly's* case. In his view the main ratio of the case was that the committee carrying out the expulsion acted as agent for the plaintiff equally with his fellow members, and therefore the plaintiff could not claim damages in respect of the acts of the committee which was acting as his own agent. Lord MacDermott regarded this reasoning as being founded on a general proposition to the effect that a member of a voluntary association who is injured by some wrongful act done by an agent of the association on behalf of its members, cannot recover against his fellow members, whose responsibility will be no greater than his own. For the purposes of the argument, Lord MacDermott accepted this proposition without inquiring as to its possible limits, but regarded it as inapplicable to the case in hand. Expulsion from membership, as a breach of contract, stood in a special category. A union committee while investigating

[16] [1955] 3 W.L.R., at p. 811.
[17] [1903] A.C. 139, 149.

a complaint regarding a member could be said to be acting on his behalf, but the act of expulsion was quite different. "To say that that is done on behalf of the person expelled seems to me an unwarranted extension of the agency and quite out of keeping with reality."[18] For this reason alone, *Kelly's* case was wrongly decided.

The views of Lord Keith to a considerable extent followed those of Lord MacDermott. A registered union remains a voluntary association of individuals but capable of being sued in its registered name. It differs from an unincorporated association in that it is unnecessary to consider who are the members at any particular time. "The registered union may be said to assume a collective responsibility for all members past, present and future, in respect of any cause of action for which it may be made liable, irrespective of the date of the cause of action. On the other hand, the judgment creditor can look only to the funds of such a trade union to satisfy his debt, and to the extent to which these may be augmented from time to time by contributions of members, whether new or old, they will still be available for the unsatisfied judgment creditor."[19] Lord Keith, however, went somewhat further than Lord MacDermott when he added these words: "These are important attributes, or characteristics, of a registered trade union which differentiate it from other voluntary associations and may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals. As an association its membership is constantly changing but as a registered trade union it has a permanent identity and represents its members at any moment of time. It would not, I think, be wrong to call it a legal entity."[20]

Turning to the contract of membership Lord Keith regarded this as a contract between Bonsor and the other members of the union. It might, however, also be regarded as a contract with the trade union, for the union in its registered capacity is representative of all the members. So long as this was kept in view, it was convenient to talk of the contract of membership as being with the union.[1]

Regarding the contract in this light, Lord Keith then referred to the reasoning in *Kelly's* case. This reasoning was based on an underlying fallacy, for the act of expulsion was the act of the union and no question of agency arose. The position is no different where the expulsion takes place on the initiative of union officials than if it is effected by the majority at a general meeting, in which case the member could sue the union, clear of any question of agency. Before the 1906 Act, the *Taff Vale* case decided that a

[18] [1955] 3 W.L.R., at p. 815.
[19] *Ibid.*
[20] At pp. 815–816.
[1] At p. 818.

trade union could be sued for damages for tort by a third party. That Act did not affect breach of *contract*. The only way the *Taff Vale* case could be explained was that it treated the union as assuming a collective responsibility for all its members. "It provides the element of continuing responsibility no matter how its membership changes." [2] Accordingly, there was no reason in principle why a member "should not have the right to sue for damages for *an act committed by the trade union* in breach of his contract of membership under the rules." [3]

Lord Somervell began his speech by pointing out that the position of trade unions is a special one, and that to import into the subject such general phrases as "legal personality," "legal entity," "quasi-corporation," might well serve to obscure that which was in any event not particularly easy to discern. The effect of the *Taff Vale* case was that a registered union remained an unincorporated association, its nature being unaffected by registration. However the "suability" of the union coupled with the limitation that a judgment against the union was only enforceable against the property of the union avoided any question of limiting the liability to the members, or the funds the property of the members, at the date of the tort.[4]

As to *Kelly's* case, Lord Somervell first examined this on the basis that the rules contained a contract between the members *inter se*. "If, under a contract to which there are a number of parties, the many by themselves, or through the agents of the association, purport to deprive one of his contractual rights, the one, *subject to possible procedural difficulties*, must be entitled to the rights, including that to special damage, which our law confers in respect of breach of contract." [5] The plaintiff is not to be identified with those of whose acts he complains, so as to deprive him of his ordinary remedies. As for procedure, if the union is the proper defendant for a declaration and an injunction, it is equally so in a claim for damages, though it would be right to add the trustees as parties, damages being recoverable only from the funds.[6]

Dealing with the question whether the specific rules in this instance created a contract between the members *inter se* or with the union as a contracting party, Lord Somervell construed these as being no more than a contract between the individual members. On the question whether the union would have power to contract as an entity, Lord Somervell contented himself with expressing agreement with the reasoning and conclusions of Lord MacDermott and on the general position.

[2] At p. 819.
[3] *Ibid.*
[4] At p. 820.
[5] At pp. 821–822.
[6] At p. 822.

Having summarised the various judicial opinions propounded in the *Bonsor* case it is proposed to discuss their outcome, firstly, in relation to the personality of a registered trade union, and secondly, in regard to a purely unincorporated association.

Is a Registered Trade Union a "Legal Entity"?

To some extent no doubt the differences in opinion on this topic are merely verbal and one may sympathise with the view of Lord Somervell that the use of phrases such as "quasi-corporation" may well serve to obscure rather than clarify the issue.[8] Nevertheless it is submitted that there is a question of substance which lurks behind this confusing terminology.

In the first place, it is noteworthy that not even Lords Morton or Porter, who fully accepted the position that a registered trade union is a distinct legal entity separate from its members, were prepared to hold that it was a corporation in the full sense. Indeed as was pointed out in the earlier note in this *Review*,[7] to hold that the Act of 1871 did in fact incorporate trade unions by registration would be to ignore the fact that that Act was deliberately framed to avoid that effect and moreover that it has been universally accepted ever since the Act was passed that whatever effect it may have had, it did not entail incorporation in the full sense.

It must be admitted, however, that on the view of Lords Morton and Porter it is not easy to discern any very material distinction between a full corporation and a near-corporation such as a registered trade union. Neither of these learned Law Lords indicates any actual distinction,[8] though Lord Porter suggests that it may well be that a registered trade union does not possess the full powers of an incorporated society. The essence of a corporation is surely that it is a separate entity in law, distinct from its members, thus enabling the entity to perform acts in the law, such as contracting, holding property, suing and being sued, as if it were an individual person. On this view, a body which by statute is to be treated as a quasi-corporation, is a legal entity to the extent authorised by the express or implied provisions of the statute. Accordingly, insofar as the statute recognises the body as a separate entity it has a distinct legal personality, though for other purposes it may be dissolved into its constituent elements. Thus, if a statute allows a registered body to contract as an entity, to that extent it is a quasi-corporation, though for other purposes, *e.g.*, holding property, it may still be necessary to treat it as a

7 (1954) 17 M.L.R., at pp. 362–363.

8 The distinction relied upon by the Court of Appeal, that the union was a quasi-corporation in relation to third parties but not as regards its own members, was rejected as untenable. It may be suggested, however, that some distinctions still remain, *e.g.*, property cannot be vested in the union itself but only in trustees on its behalf; and the provisions of s. 4 of the 1871 Act limit the liability of the union in the case of certain contracts.

merely voluntary society made up of its constituent members. If, however, the statute in effect confers on the body all the normal powers of a legal *persona* it will be a corporation in everything but name; and this appears to be the outcome of the opinions of Lord Morton and Lord Porter when they hold that a registered trade union is a distinct legal entity and a "near-corporation." It is not a corporation *in name*, for this can only result from an express act of incorporation, but it does possess all, or practically all, the attributes of a full corporation. It enjoys therefore a special statutory status substantially equivalent to that of a corporation, but subject to any limitations upon it which may be deduced from the statute itself.

It should be emphasised that on this view (which it is submitted is the one hitherto usually accepted as applicable to registered trade unions), there may be considerable variations in the degree to which any class of statutory body is to be treated as a quasi-corporation. The real significance of the current of authority initiated by the *Taff Vale* case is to indicate that where a statute confers wide powers on a non-corporate body this may result, as a matter of statutory construction, in the body being treated as enjoying a quasi-corporate status in certain respects which are not expressly specified in the Act itself. Moreover, this construction may, in some cases, go so far as to result in the body being treated as if it were a corporate entity for all purposes save in such respects as are expressly excluded or restricted by the terms of the Act itself.

When we turn to the view put forward by Lord MacDermott, and followed also by Lord Somervell, we find an apparent refusal to accept the existence of such an intermediate semi-corporate status. On this view it would seem that an association is either a separate legal entity, in which case it is a corporation with whatever attributes such a body may possess, or it is no more than a voluntary collection of individuals and none of its acts can be dealt with save on the basis of dissolving the notional association into its constituent elements. With all respect, it is submitted that such a view is a retrograde one, and one which deprives the notion of legal personality of that measure of flexibility which is desirable for the working of a modern system of law. As we have ventured to write elsewhere:—"The civil law made a rigid distinction between the *universitas* and the *societas*: the one was and the other was not capable of having rights and duties as a separate entity. Modern law has been obliged to go beyond this narrow classification and to recognise that intermediate degrees of personality may exist which lie between the full personality of the *universitas* and the purely individual *societas*. In English law the trade union, the friendly society, and the commercial partnership all have a status of their own which coincides neither with

that of the corporation nor of the purely voluntary association, and a similar gradation is to be found in continental law."[9]

Moreover, although in Lord MacDermott's view, a registered union must be denied a distinct status and is no more than a voluntary group of members, it is nevertheless conceded that the legislature has conferred upon such unions some of the characteristics of a juridical person.[10] However, since that Act does not actually incorporate a registered union it is still a mere voluntary association and accordingly remains as a matter of substance an unincorporated association of members. Such cases as that of the *Taff Vale Railway* entail merely procedural consequences.[11] These procedural consequences enable a person suing a registered union to get over the difficulty that the membership is usually a very large one and subject to constant fluctuations. The *Taff Vale* decision by allowing the union to be sued in its registered name removes this obstacle. But, it may be asked, is a procedural rule of this kind sufficient? For the union or any other body may be sued in a representative action, but there still remains the difficulty of fixing liability in relation to a body with a fluctuating membership.[12] This involves a question of substance, namely, upon which person or persons liability is to be fixed. For as Lord MacDermott points out, "the party suing, if he is to succeed, has still, of course, to show that the union concerned is, *as an organised combination*, responsible for the act of which he complains; but he does not need to marshal the membership on any basis of individual liability as, for example, by excluding those who are infants or who have joined since his cause of action arose, or who, as a minority, have voted in his favour."[13] Surely, however, this is to attribute substantive and not merely procedural consequences to the *Taff Vale* case, for it is in effect altering the incidence of liability and treating the union as "an organised combination" distinct from the fluctuating membership which comprises it. And is this not merely another way of recognising that the registered union, to the extent that the law treats it as an "organised combination," is an entity distinct from its fluctuating membership? It is submitted, therefore, that to achieve the purpose of the *Taff Vale* line of cases, it is not sufficient to regard those cases as entailing purely procedural consequences, for if this were so there should be no difference in substance between an action against a registered union in its registered name and a representative action against the members of a voluntary society.

The same point arises in regard to the universally accepted view that a judgment against the registered union cannot be enforced

[9] *Unincorporated Associations* (1938), pp. 217–218.
[10] [1955] 3 W.L.R., at p. 809.
[11] At p. 811.
[12] *Cf. Barker* v. *Allanson* [1937] 1 K.B. 463.
[13] [1955] 3 W.L.R., at p. 811.

against the individual members. According to Lord MacDermott, the explanation of this is the absence of any procedural machinery for enforcing the judgment against the members. This applies equally, however, in the case of a representative action.[14] Surely the more satisfactory explanation is that the contract is with the union as "an organised combination" and that liability can therefore only be enforced against the trade union funds. Lord MacDermott's view, however, seems to be that the contract is with the individual members and that a breach of the contract is therefore in principle enforceable against the individual members. He recognised, however, that such enforcement raised "difficult considerations" upon which he preferred to express no opinion.

An intermediate position between that of Lords Morton and Porter, on the one hand, and Lord MacDermott on the other, was taken up by Lord Keith. According to his view, a registered union is at the same time both a legal entity and a mere association of individuals. If this opinion meant that the union was a quasi-corporation to the extent recognised by the governing statute and for other purposes remained a mere voluntary association, it could be said substantially to accord with the position taken up by Lord Morton and Lord Porter. It is apparent, however, that in Lord Keith's view a registered union is to be regarded both as a legal entity and as an unincorporated association *in relation to the same transaction*. Thus as regards the contract of membership this is fundamentally a contract between the individual members, yet it may also be regarded as a contract with the union itself, for the union in its registered capacity is representative of all the members.[15] With all respect, it is not easy to follow this point of view. Moreover Lord Keith acknowledges that the registered union assumes "a collective responsibility for all members past, present and future" and that the judgment creditor can look only to the funds of the union.[16] Yet if the contract is with the individual members it is difficult to see why, subject to procedural obstacles, the members should not be, at least in theory, capable of being rendered liable for any breach of the contract.

It is submitted, therefore, that the intermediate solution propounded by Lord Keith hardly offers a simple way out of the dilemma. At the same time it is also submitted that Lord Keith's view cannot be said decisively to support either of the two conflicting positions taken up by the other members of the House. In this state of affairs the hope may be expressed that in subsequent cases it will prove possible to follow the opinion of Lords Morton and Porter and boldly recognise the existence of a distinct legal entity, whether fully corporate or not, and so avoid the tangle

[14] See R.S.C., Ord. 16, r. 9; and *cf.* the writer's articles in (1949) 12 M.L.R. 409, and (1953) 16 M.L.R. 359.
[15] [1955] 3 W.L.R., at p. 818.
[16] At p. 819.

of procedural complexities which must necessarily be entailed where the contract is regarded as made by the individual members and enforcement of a breach of such a contract has to be viewed in the light of that circumstance. It must be recognised, of course, as was done by both Lord Morton and Lord Porter, that even if the union is itself a legal entity it is still a question of construction on the particular rules whether the contract is with the union or between the members *inter se*; though once the union is recognised as a separate legal entity there is much to be said for construing the contract wherever possible as being made with the union as such in its quasi-corporate capacity.

It should be added, on this aspect of the decision, that apart from its effect on registered trade unions the case has wider implications which may well arise in regard to other similar registered bodies, such as friendly societies. It would, however, be outside the scope of this article to seek to examine the status of such other bodies under their respective statutes, in the light of the *Bonsor* case.

Can a Purely Unincorporated Association be Sued for Damages for Wrongful Expulsion of a Member?

The views of Lords Morton and Porter did not necessitate consideration of this question since they were able to hold that *Kelly's* case was wrongly decided on the simple ground that it failed to recognise the registered union as a separate entity capable of contracting and being sued in its own name. Lord MacDermott, on the other hand, agreed with this aspect of the judgments in *Kelly's* case, and therefore was obliged to consider whether that case was correctly decided on the basis that even a registered trade union is still no more than a collective name for an association of individuals.

By treating the union as in effect an unincorporated society of individuals rather than as a legal entity distinct from its members —which was also the approach adopted by the court in *Kelly's* case—it became necessary to decide on whose behalf the committee was acting when proceeding to expel a member. In Lord MacDermott's view, the answer to this question was plain. For whatever may be the general position when the union committee or official is engaged in carrying out some duty concerned with the affairs of the union, expulsion stands in a special category. It is totally unrealistic to suggest that in such a case the committee is acting on behalf of the expelled member, who is being thrust out of the association by the very act which is said to be done on his behalf. This means that the act of the committee is therefore to be treated not as the collective act of the whole body of members including the expelled member, but of that body minus the expelled member. This eminently sensible conclusion, which

was already adumbrated in the Court of Appeal by Denning L.J.,[17] removes the substantive objection that was held to stand in the way of the plaintiff's claim to damages in *Kelly's* case. And any procedural difficulty, so far as a registered union was concerned, was resolved according to Lord MacDermott, by the special position of such a union which assumes a collective responsibility in its registered name, without any need to inquire which specific members constitute the combination for the purposes of that responsibility. Also the judgment can be enforced solely against the union funds, and therefore no question of personal liability of any particular member arises in the case of such a judgment.

Lord MacDermott also rejected the view of Bankes L.J.[18] to the effect that as the committee acted irregularly and contrary to the rules in expelling the plaintiff, he could not treat the committee as the authorised agent of his fellow members. The basis of this view was no doubt the principle that the officials of the union are only authorised by the members to act in accordance with the rules, and if they exceed that authority the members are not to be bound by any act in excess of such authority. On the other hand, if the body of members gives express authority in any particular case, as by a resolution [19] to that effect, the act of the official will be treated as authorised. Lord MacDermott did not cast any doubt on this general position but pointed out that the union had not sought to disavow the action of the committee but had on the contrary approved and adopted what it had done.[20] Hence even if the act was unauthorised in the first instance, it was subsequently ratified by the union membership.

A similar viewpoint was expressed by Lord Keith. The committee was not the agent of the expelled member. Indeed, in Lord Keith's opinion, no question of agency arose at all. The act of expulsion even if unauthorised initially was not disclaimed, and accordingly it was the act of "the union," which was bound by the voice of the majority and which could be sued in its registered name.[1]

It will be seen that the opinion of Lord MacDermott opens up the broad question as to the right of a member of a purely unincorporated association to sue the collective membership in damages in the event of a wrongful expulsion. Since, on this view, the mistake of the court in *Kelly's* case was to regard the obstacle in the way of such proceedings as substantive in character and not merely procedural, it would follow that provided the procedural difficulty can be got over there is no reason why such proceedings should not be brought in the case of a purely voluntary society.

[17] See [1954] Ch. at p. 513.
[18] In *Kelly* v. *N.S.O.P.A.* (1915) 84 L.J.K.B. at p. 2239.
[19] Assuming the resolution was passed in a form which under the rules would bind the whole membership.
[20] [1955] 3 W.L.R., at pp. 813–814.
[1] At p. 819.

For the wrongful act of expulsion would be regarded as made on behalf of the members excluding the plaintiff, and though unauthorised in the first instance it would usually be adopted expressly or impliedly by the body of members. But in this case the society could not be sued in its collective name, and regard would therefore have to be had to the precise membership that was being sued.

There are two ways in which a collective body of members may be sued, *viz.*, in a representative action, or personally. In any event it would seem clear that the proceedings would have to be confined to those members who were members at the date when the unlawful expulsion occurred. Suppose then that such an action was brought in a representative form under R.S.C., Ord. 16, r. 9. It is generally assumed, though it has never been specifically decided, that any money judgment which results from such a proceeding can only be enforced against the society's collective funds. Indeed there seems to be overwhelming force in this conclusion, since there is no procedure whereby execution can be levied on the individuals represented by the representative defendants,[2] and moreover the individual members so represented are not parties on the record and take no part and have no right to take any part in the proceedings.[3]

If then the proceedings are brought in a representative form, can damages be awarded against the common fund of the society? The first difficulty in the way of obtaining such a judgment is that the membership may have changed since the date of the expulsion. This has been regarded as a fundamental objection to such a proceeding in the case of a debt due under a contract, where subsequent fluctuations in membership had rendered the latter different from what it was at the time the contract was made and performed.[4] In the present case the difficulty may be expressed in this way. At the date of the expulsion the members were *A* to *S*. At the time of the proceedings the members are *C* to *V*, *A* and *B* having left and *T*, *U* and *V* having since joined. If the action is to be brought in a representative form against *A* to *S*, the members at the material time, can this result in a judgment enforceable against the funds now the property of *C* to *V*?[5]

[2] See the articles referred to *supra*, p. 3 note 14.

[3] See *Markt Ltd.* v. *Knight S.S. Co. Ltd.* [1910] 2 K.B. 1021, at p. 1039, *per* Fletcher Moulton L.J.

[4] See *Barker* v. *Allanson* [1937] 1 K.B. 463.

[5] It may be suggested that this problem can be solved without breach of legal principle. The members who have retired can be ignored since they cease to have any interest in the fund. As to the new members it may be said that they join and become co-owners of the fund subject to existing liabilities. This should suffice where the plaintiff is himself a member (or a wrongfully expelled member). The position is more difficult where the action is by a third party since any arrangement between the co-owners would be *res inter alios acta*.

A further difficulty is that if a member is wrongfully expelled the court will declare the expulsion void and order his reinstatement. Accordingly the plaintiff will remain a co-owner of the common fund and his judgment for damages will have to be enforceable against a fund of which he is joint owner.[6]

The above difficulties, even if they can be surmounted, serve to emphasise the extraordinary perplexities involved in treating *de facto* associations as being no more than bundles of individuals. The representative action has proved but a feeble instrument in circumventing these problems and there are already signs that courts are finding themselves constrained to adopt a less technical attitude than hitherto and to allow justice and common sense to triumph over legal analysis.[7]

As to the question of suing the members personally this is hardly likely to be a practical proposition since this would involve making each of them an individual defendant.[8] It would seem that their liability would be joint[9] so that any individuals sued could insist on all the other members being joined as co-defendants.[10] It seems clear also that in any event the claim would not extend to the members of a dissident minority.[11] Perhaps a more effective mode of bringing personal proceedings would be to sue the committee for wrongfully procuring a breach of contract between the plaintiff and the other members.[12]

Most people, apart from those who administer trade union funds, are likely to agree that the *Bonsor* case has struck a useful blow in favour of individual freedom. Rumour has it that the unions are considering whether the results of the case can be avoided by so framing their rules as to exclude the jurisdiction of the court. Happily, however, there are manifest objections to such a course. For any rule excluding the jurisdiction of the court to interpret the rules, or to intervene for failure to observe the principles of natural justice, will be treated as void as against public policy.[13] Another possibility is for the unions to make their rules subject to an express provision that they are not to constitute a binding contract between the parties and are not intended to create legal relations. Even, however, if such a course

[6] Of course the whole conception of co-ownership in regard to the property of an unincorporated society with a large and fluctuating membership is totally unrealistic. Moreover in those cases where the funds are not divisible among the members in any event, *e.g.*, if it is a charitable society, the issue of co-ownership would be avoided.

[7] See *e.g.*, *Stone* v. *Bolton* [1951] A.C. 860; and *Campbell* v. *Thompson* [1953] 1 Q.B. 455.

[8] Under R.S.C., Ord. 16, r. 4.

[9] See *Everett* v. *Tindall* (1804) 5 Esp. 169.

[10] See *Norbury Natzio Ltd.* v. *Griffiths* [1918] 2 K.B. 369.

[11] See *per* Lord Keith in [1955] 3 W.L.R., at p. 818.

[12] *Cf. Abbott* v. *Sullivan* [1952] 1 K.B. 189, where a claim of this sort failed on the particular facts of the case.

[13] *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 239; *Baker* v. *Jones* [1954] 1 W.L.R. 1005.

is permissible,[14] it might well create more problems for the unions than it would solve. Moreover, it is doubtful whether even such an express provision would necessarily deter the court from intervening to restrain a wrongful expulsion, though no doubt it would be effective to prevent the grant of relief by way of damages.

Although the result of the *Bonsor* case will be widely applauded regret may be expressed that unanimity could not be reached on the question of principle, so that the case still leaves unresolved the precise nature and effect of "quasi-corporate" personality in our law. And while the case is also of value in once again bringing to light the perplexing problems which result from the "atomistic" view adopted towards the unincorporated association, it does little to resolve those perplexities. Such a statute as the New Zealand Incorporated Societies Act of 1908 seems to point the way to a happier state of affairs. Even this particular piece of legislation is deficient however in that it fails to make provision for the case of a society which is capable of registering under the Act but nevertheless fails to do so.

Dennis Lloyd.*

[14] The Registrar of Friendly Societies might conceivably refuse to register a union whose rules were framed on such a basis, on the ground that the rules did not effectively comply with s. 14 of the Trade Union Act, 1871. An existing certificate of registration might also be withdrawn under s. 8 of the Trade Union Act, 1876.

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STARE DECISIS IN THE COURT OF APPEAL

ELEVEN years have passed since the Court of Appeal decided in *Young* v. *Bristol Aeroplane Company* [1] that it was absolutely bound by its own prior decisions. The rule of *stare decisis*, by which the court declared that in future it would be bound, was qualified by various exceptions. In the first place the court held that if it were confronted with two conflicting decisions of its own, it would be wrong to say that it was absolutely bound by either; it would be in the position of having to choose which of the decisions it would follow. In the second place the court held that if it were confronted with a decision of its own which (although not expressly overruled) could not stand with a later decision of the House of Lords, it would be wrong for it to follow such previous decision of its own when a higher court had impliedly declared such decision to be wrong. These exceptions to the rule are, as Lord Greene M.R. said when expounding them [2], apparent rather than real. It is the third exception, that the court will not consider itself to be bound by a previous decision where such decision was given *per incuriam*, which is a true exception to the rule, and to which attention must now be given.

In analysing the judgment of Lord Greene M.R. in *Young's* case one must remember that it was necessary for the Master of the Rolls to decide only the facts of the case before him, and that he was not seeking to venture upon exhaustive definitions; one must also avoid approaching such judgment in the way that one would approach an Act of Parliament. One must remember also that the court arrived at its decision in *Young's* case bearing in mind the decision in *Lancaster Motor Co. (London) Ltd.* v. *Bremith.*[3] In that case judgment creditors of a company in liquidation sought a garnishee order in relation to the liquidator's account at the bank; the court held that notwithstanding an earlier decision of the court [4] on substantially the same facts, in which such an order was made, it would be wrong and contrary to authority to make it. The earlier decision in the view of the court was a "judgment delivered without argument and delivered without reference to the crucial words of the rule and without any citation of authority . . . the court was induced to say what it did . . . because counsel had not really desired to argue the point on either side." [5]

[1] [1944] 2 All E.R. 293.
[2] [1944] 2 All E.R. 300.
[3] [1944] 2 All E.R. 11.
[4] *Gerard* v. *Worth of Paris* [1936] 2 All E.R. 905.
[5] [1941] 2 All E.R. 13, *per* Sir Wilfrid Greene M.R.

Lord Greene M.R. was thus fortified by authority when he gave as an example (*sic*) of a case of a decision given *per incuriam* a decision "given in ignorance of the terms of a statute or a rule having the force of a statute" [6]. Although he did not say so, the Master of the Rolls must be taken to have implied that such ignorance affected the decision of the court in the sense that the court's decision would necessarily have been different if the statute or rule had in fact been present to its mind. It does not of course follow as a matter of logic or fact that false premises inevitably yield false conclusions [7], and if the later court is not satisfied that the earlier decision would have been different in a material respect, then it remains bound by the earlier decision. Although it is possible to argue that ignorance of any relevant statute or statutory rule demonstrates *incuria*, such *incuria* only becomes important where it is material to the judgment.

It seems clear beyond doubt that the Master of the Rolls envisaged, and has been taken by later courts to have envisaged, that there was a duty on later courts to examine and analyse the reasoning by which the earlier court arrived at its decision. The gap in the decision in *Young's* case, which it has taken the efforts of the courts during the succeeding years to fill, was that the court in *Young's* case did not make it clear that a decision might be held to have been given *per incuriam* if given in ignorance of some binding authority apart from statute.

All that the court in *Young's* case had to say on this point referred to decisions which were in fact "covered" [8] either by earlier decisions of the same or co-ordinate courts or of the House of Lords. This seems to mean that where an earlier case was "on all fours with" a prior case of the same or a co-ordinate court or of the House of Lords, which the court in the earlier case had been ignorant of, a later court is not bound to follow such decision given in ignorance. Such a case must be rare though not unknown [9]. A case is likely to be more frequent where the

[6] "Where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute . . . it cannot in our opinion be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind": *per* Lord Greene M.R. [1944] 2 All E.R. 300. Professor Goodhart took the view, which has not been supported by later authority, that "this probably means delegated legislation; it cannot be construed to cover the ordinary common law because if it did then it would always be open to counsel to argue that an apparently binding precedent was in conflict with the pre-existing law": "Precedents in the Court of Appeal" (1947) 9 C.L.J. 361.

[7] "A hypothesis is falsified if it has false consequences: but to assume the converse is to commit a fallacy. It is by no means necessary that if a hypothesis is false its consequences are"; from letter of Prof. A. J. Ayer to *The Times*, May 7, 1954, quoted by Prof. J. L. Montrose in (1954) 17 M.L.R. 462.

[8] [1944] 2 All E.R. 300.

[9] See, for example, *Gregory* v. *Cattle* [1943] 1 All E.R. 654 discussed below.

reasoning or some step in the reasoning has been "disabled"[10] or proved to be "demonstrably wrong"[11] because the court acted in ignorance of a previous binding authority. It was the attitude of the Court of Appeal to such cases which was not made clear in *Young's* case and which only recently has been put beyond doubt.

Narrow Construction

One aspect of *Young's* case which has been constantly referred to since is that although the court was there not purporting to lay down an extensive classification of *per incuriam* decisions, it emphasised that types other than those there mentioned (as amplified in the manner mentioned above) "would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts"[12]. The court no doubt saw the danger that in the absence of some such warning, advocates might use the *per incuriam* principle as a perpetual platform on which to take a last-ditch stand. Later courts have been consistently narrow in their construction of the principle.

Two further things with regard to *Young's* case must be said. The first is that the court there implied, or has been taken to have implied, that when it talked of "ignorance" of a provision it meant or included "forgetfulness." The second is that the court there stressed that it is not possible to argue that the *per incuriam* principle applies where the court has been seised of all the relevant statutory provisions, and all that it is argued that it has done is to ignore or forget a rule of construction applicable to those provisions. This argument has been put forward on occasion without success[13]. Where the court has construed a statute such a construction is as definitive as a ruling on any other point of law, for to hold otherwise would do much to destroy that judicial comity which has been said to be the *raison d'être* of the doctrine of *stare decisis*[14].

It is thus clear that the *per incuriam* principle began its formal career[15] as the third exception to the rule of *stare decisis* in a

[10] See for example *Mucklow* v. *Inland Revenue Commissioners* [1954] 2 All E.R. 508, discussed below.

[11] *Per* Evershed M.R. in *Morelle Ltd.* v. *Wakeling* [1955] 1 All E.R. 708.

[12] [1944] 2 All E.R. 300.

[13] *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell* [1949] 1 All E.R. 749.

[14] *The Vera Cruz* (*No. 2*) (1884) 9 P.D. 96 at 98. And see Halsbury vol. XIX p. 257 (2nd ed.) "the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say that it is wrong and productive of inconvenience."

[15] It is of course a doctrine much older than the decision in *Young's* case. It was dealt with by Lord Halsbury in the House of Lords in *London Street Tramways* v. *L. C. C.* [1898] A.C. 375 at 380 as follows: "It is said that this House might have omitted to notice an Act of Parliament or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a

not altogether satisfactory form. It is now proposed to trace the application and development of the principle during the time which has since elapsed and to comment on the manner of its growth.

Misunderstanding and Mistake

In 1947 the Court of Appeal decided the case of *Williams* v. *Glasbrook Brothers Ltd.*[16]. That was an appeal by a workman from the decision of a county court judge, and it appeared in the course of the argument in the Court of Appeal that the facts of the case were precisely covered by the facts in *Wilds* v. *Amalgamated Anthracite Collieries Ltd.*[17] decided by the Court of Appeal earlier the same year. Counsel for the employers argued that the court in the instant case was not bound to follow *Wilds'* case and in his argument took two points. First, he said, the decision in *Wilds'* case was inconsistent with an earlier decision of the House of Lords in *Jones* v. *Amalgamated Anthracite Collieries Ltd.*[18] and therefore the court was entitled to disregard it. It is not clear from the reported judgment whether counsel was saying that this fact brought it within the second exception to the rule in *Young's* case; probably not, since the second exception in its natural meaning refers only to cases in the Court of Appeal which (although not expressly overruled) are inconsistent with subsequent cases in the House of Lords[19]. If he was saying anything therefore he was saying that the court in *Wilds'* case had misunderstood the earlier decision of the House of Lords in *Jones'* case, and seeking to advance such misunderstanding as a species of *incuria* which would entitle a later court to depart from the earlier court's decision. Clearly such an argument was bound to fail, for to have acceded to it would have countenanced the destruction of the whole value of the system of precedents, in that it would always be open for an advocate faced with a contrary prior decision to treat the matter as at large.

The second point advanced by counsel for the employers in support of his attempt to be rid of the decision in *Wilds'* case was that the court decided *Wilds'* case under a wrong subsection of the relevant statute, and therefore the premise having been proved demonstrably false, the conclusion must also be false. Whether or not this line of reasoning is valid is doubtful[1]. In

very manifest one—namely that that would be a case of mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed on the hypothesis that the Act existed."

16 [1947] 2 All E.R. 884.

17 [1947] 1 All E.R. 551.

18 [1944] 1 All E.R. 1.

19 See on this point however *Fitzsimmons* v. *Ford Motor Co.* [1946] 1 All E.R. 429 discussed by R. N. Gooderson in 1950 C.L.J. 432.

1 Compare here *Cackett* v. *Cackett* [1950] P. 253 and the judgment of Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687.

any event the court in *Williams'* case found it unnecessary to decide the matter one way or the other, since in the view of Lord Greene M.R. if there was a mistake made by the judges as to the subsection under which they were deciding *Wilds'* case it was a mistake confined to one only of the Lords Justices, and therefore could not affect the ultimate decision.

It is submitted that the court might here have distinguished more clearly between what might be termed the "subjective" and "objective" mistake of the earlier court. Counsel was, it is understood, arguing that it was open to the later court to examine afresh the facts in the earlier case and to say in the light of the later court's view of the matter, whether the earlier court had applied the law correctly. In other words, with the distinction that the law now in question was a statutory provision and not a judicial authority, this was merely a variation on his earlier argument and was open to the same criticism. Indeed the court refused to be beguiled into any consideration of this [2]—a question of "objective" mistake—and proceeded on the footing that the argument that was being addressed to them was based on the assumption that the earlier court had made a "subjective" mistake (or what Lord Halsbury called a "mistake of fact" [3]), in that the judges thought they were doing one thing and in fact were doing another. Were this so it is submitted that this would have been just one of those residual cases mentioned in *Young's* case where the *per incuriam* principle would apply. The court found, however, that there had been no mistake, and on this ground also the respondent's argument failed.

A Distinction Blurred

Two other cases decided in 1947 are worthy of note. Both were decided by the Divisional Court and are therefore not binding on the Court of Appeal although entitled to the greatest respect. One of them, *Huddersfield Police Authority* v. *Watson* [4], is important principally because in it for the first time the Divisional Court held that it, too, was bound by its own decisions, subject to the same exceptions as those set out by the Court of Appeal in *Young's* case. The case is also important because the view was put forward for the first time that the *per incuriam* principle applied where an earlier court had acted in ignorance or forgetfulness of a binding precedent and not merely a statute or statutory rule.[5]

[2] "I am not going to enter into the question which was the right subsection": *per* Lord Greene M.R. [1947] 2 All E.R. 885.

[3] See n. 15, *supra*, p. 138.

[4] [1947] 2 All E.R. 193.

[5] "What is meant by giving a decision *per incuriam* is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or statute": *per* Lord Goddard C.J. [1947] 2 All E.R. 193 at 196.

Such a view at that time was not universally held and had its learned critics.[6]

It was however repeated in another case decided by the Divisional Court in the same year. In *Moore* v. *Hewitt*,[7] a case which is frequently cited in the courts in connection with the nature of the corroboration required in bastardy proceedings, counsel for the respondent took the point that the appeal was bad in that the justices had failed to state a case for the consideration of the court within the period of three months as provided by rule 52 of the Summary Jurisdiction Rules, 1915. He cited in support of his argument *Gregory* v. *Cattle*,[8] where a similar point taken by counsel for the respondent[9] succeeded.[10] Nowhere in *Gregory's* case however was it brought to the notice of the court that the very point had been before the court previously in *Hughes* v. *Wavertree Local Board*[11] and *Lane* v. *Rendall*,[12] in which cases the court had held that the rule was merely directory and that it was not therefore necessarily fatal to the appellant's case that it had not been stated in time.

This was clearly a case where an earlier case, otherwise binding on the court, had been decided contrary to an even earlier case with which it was "on all fours." It was not an instance of the reasoning of the earlier court having been disabled by ignorance, but of a decision having been given in ignorance of a previous decision which "covered the point."[13] This being so it did not, if the rules in *Young's* case were to be strictly applied, entitle the court to refuse automatically to follow the decision in *Gregory* v. *Cattle*.[14] The position was that at the date when *Moore's* case fell to be decided, there was a conflict of two sets of authorities of the same court, and the court in *Moore's* case therefore had the duty of deciding which set of authorities it would follow. Lord Goddard C.J., however, in giving the judgment of the court,[15] was far from making it clear that there was a duty in the court to choose which decision should be followed. He failed to draw the distinction which has been ventured above, between a case wrongly decided because of ignorance of a binding authority "on

[6] For example Professor A. L. Goodhart, "Precedents in the Court of Appeal" (1947) C.L.J. 349, 361.
[7] [1947] 2 All E.R. 270.
[8] [1943] 1 All E.R. 654.
[9] The cases were stated under the Summary Jurisdiction Act, 1857 (under which no time limit was imposed), and under the Summary Jurisdiction Act, 1879 (under which r. 52 of the 1915 rules was made, imposing a three months' time limit), and the question was whether the time limit imposed by the later Act applied also to the earlier. The broader question whether the rule was mandatory or merely directory was not apparently considered.
[10] Charles and Hallett JJ., Stable J. dissenting.
[11] (1894) 58 J.P. 654.
[12] [1899] 2 Q.B. 673.
[13] [1944] 2 All E.R. 300.
[14] [1943] 1 All E.R. 654.
[15] And Macnaghten and Lynskey JJ. agreed with him.

all fours" with it, and a case wrongly decided because of a defect of reasoning due to ignorance of a binding authority.[16] He therefore treated it as axiomatic that the decision in *Hughes'* case was binding and that the decision in *Gregory* v. *Cattle* [17] must automatically be set aside. It is not suggested that the practical result in *Moore's* case would have been different if the correct approach to it had been made, but there may well be cases where the result would be different.[18]

Presumption of Care

In 1949 the rule in *Young's* case was again before the Court of Appeal in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell.*[19] This was a Rent Restrictions Act appeal in which the point in issue was the interpretation of certain provisions of the 1933 Act.[20] which were in the same terms as similar provisions of the 1920 Act.[1] In 1925 the Divisional Court had placed upon these provisions a certain interpretation [2] and in 1933 the amending Act was passed incorporating the provisions in the same terms. In 1946 the Court of Appeal placed upon the provisions of the 1933 Act an interpretation which was different from that of the Divisional Court [3] although the decision of the Divisional Court was present to its mind. The question to be decided therefore was whether the Court of Appeal in 1946 was entitled to place such a different construction on the statute, bearing in mind the rule of construction that "where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same . . . phrase in a similar context must be construed so that the . . . phrase is interpreted according to the meaning that has previously been assigned to it." [4]

Counsel sought to bring the case within the *per incuriam* principle by arguing that either the court in 1946 had acted in ignorance of the fact that the words of the 1933 Act were the

[16] "The Court of Appeal is bound by its own judgments with certain exceptions, and one of those exceptions is where the court gives a decision *per incuriam* because the provisions of a statute or the authority of a case have not been brought to their attention": *per* Lord Goddard C.J. [1947] 2 All E.R. 272. The line continued to be blurred for in *Younghusband* v. *Luftig* [1949] 2 All E.R. 72 at 75 Lord Goddard C.J. reaffirmed this view—"the court is not bound by a decision of its own if a case or a statute had not been brought to the attention of the court and the decision had been given in ignorance or forgetfulness of the existence of that case or statute."

[17] [1943] 1 All E.R. 654.

[18] And in any event, from the point of view of counsel, a correct application of the rules makes the difference between a moot case and one which is unarguable.

[19] [1949] 1 All E.R. 749.

[20] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. 1 (g).

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 s. 5 (1).

[2] *Braby (Frederick) and Co.* v. *Bedwell* [1926] 1 K.B. 456

[3] *Braithwaite and Co. Ltd.* v. *Elliott* [1946] 2 All E.R. 537.

[4] *Per* Lord Buckmaster in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402 at 411.

same as the words of the 1920 Act, or alternatively that in deciding as it did, the court in 1946 was ignoring or forgetting the rule of construction which has just been propounded. The first leg of the argument failed, as it was clear from the report of the 1946 case that the court must have known of the terms of the relevant statutes; the second leg depended on the premise that a rule of construction is within the class of "statutes or rules having the force of a statute" mentioned by Lord Greene M.R. in *Young's* case.[5] It would have been sufficient to dispose of the whole argument to have held that such was not the case. Bucknill L.J., however, fell back on the ground of public policy, Denning L.J. did not deal with this point at all, and Cohen L.J., though doubting the truth of the premise, refused to attribute to the 1946 court ignorance of a principle of construction which is so well known[6]. If the question ever arises again, it would in the writer's submission be better to decide the point directly, and to exorcise the notion that a precedent case can be upset by attributing to the court which decided it, an ignorance or forgetfulness of common law rules.[7]

There is moreover a presumption that an earlier court did not act *per incuriam*, and the burden of showing that it did so act falls on the party making the submission. The authority for this proposition is to be found in *Gibson* v. *South American Stores (Gath and Chaves) Ltd.*[8] where the question was whether or not a certain trust deed constituted a valid charitable trust. The matter appeared to be covered by an earlier authority of the Court of Appeal, which was however unreported.[9] This fact was no doubt to some extent of assistance to counsel for the appellant, but in deciding against him on his submission, Sir Raymond Evershed M.R. made it abundantly clear that the burden of showing affirmatively that the earlier court had acted *per incuriam* was on him.[10] The Master of the Rolls went even further, however, and said that "prima facie one must I think assume that in a case in which the point is directly raised, the judges of this court will have considered it, more particularly where they reverse the decision of the court below . . .".[11] If this view is the correct one (and it is submitted with respect that it is) the task of counsel seeking to upset a precedent case on the ground of *incuria* in such circumstances is difficult; even where the case has not been fully argued on both sides he has to meet the presumption

5 [1944] 2 All E.R. 300.
6 [1949] 1 All E.R. 754 755.
7 Of which a rule of construction is one.
8 [1949] 2 All E.R. 985 at 996.
9 *Re Sir Robert Laidlaw's Will Trusts* (1935) (*unreported*).
10 "I think myself that it would be for counsel for the company to shew that (if it was so) the decision was given per incuriam. In other words, the onus would be on him . . ." [1949] 2 All E.R. 996.
11 *Ibid.*

that the court was in possession of the relevant authorities, and was deciding the right point unless the contrary can be clearly shown.

It is therefore the more remarkable that in *Penny* v. *Nicholas* [12] decided by the Divisional Court in the following year, Lord Goddard C.J. should advance the novel proposition that "we can however always differ from a case on the ground that it has not been argued on both sides".[13] Such a proposition hardly seems to be consonant with authority, and certainly has no foundation in the judgment of the Court of Appeal in *Young's* case, to which Lord Goddard then went on to refer. In *Penny's* case the question was whether or not a motorist could be convicted of exceeding the speed limit on the opinion evidence of a police officer as to his rate of speed together with evidence of the reading of an untested speedometer. In *Melhuish* v. *Morris* [14] the Divisional Court [15] had held in no uncertain terms that before there could be a conviction there must be evidence that the speedometer was accurate. The respondent in that case, however, was not represented, and two earlier cases,[16] both decided long before section 10 (3) Road Traffic Act, 1930 became law, were not cited to the court.

The court declined to follow *Melhuish's* case, as it was entitled to do, on the ground that the earlier court had acted *per incuriam*. Again, however, it was not made clear that *Melhuish's* case had been decided in ignorance of earlier binding authorities "on all fours" with it, and that the duty of the court was to decide whether or not to follow *Melhuish's* case and not automatically to disregard it [17]. Had the court so expressed itself it might have found much greater difficulty in following cases decided long before the relevant statute was passed rather than one decided after the statute was passed, and which had been consistently acted upon.

Lack of Argument

That the Court of Appeal itself does not regard lack of argument *per se* as entitling a later court to decline to follow an earlier case is implicit in the judgment of Denning L.J. in *Gower* v. *Gower*.[18] In that case the question was raised whether or not

[12] [1950] 2 All E.R. 89.
[13] *Ibid.* at p. 91.
[14] [1938] 4 All E.R. 98.
[15] Lord Hewart C.J. and Charles J.
[16] *Gorham* v. *Brice* (1902) 18 T.L.R. 424 and *Planq* v. *Marks* (1906) 70 J.P. 216, in both of which it was held that the opinion evidence of a police officer as to speed together with his evidence of the reading of an untested stopwatch was sufficient to ground a conviction.
[17] "Where material cases or sections of statutes were not cited to the court in a case, the court need not follow the decision if those cases or enactments might have influenced it had they been cited": *per* Lord Goddard C.J. [1950] 2 All E.R. 92.
[18] [1950] 1 All E.R. 804 at 806.

the standard of proof applicable to adultery in a matrimonial case was the same as that applicable to the trial of a criminal case. It had been so held in *Ginesi* v. *Ginesi* [19] two years earlier when the court [20] entertained no doubts on the point. The decision in *Ginesi* v. *Ginesi* was not directly in issue in *Gower* v. *Gower* since the court expressed itself satisfied that, even assuming that adultery must be proved beyond reasonable doubt,[1] it was so proved in the instant case. Denning L.J. in a passage which, although *obiter*, is none the less of interest, strongly criticised *Ginesi* v. *Ginesi* on the grounds, *inter alia*, that it was not fully argued because counsel in that case conceded the point as to the burden of proof, that a material case decided by the House of Lords on the point [2] was not cited, and that no reference was made to the relevant provisions of the Matrimonial Causes Act, 1937,[3] which themselves laid down a standard of proof applicable to all matrimonial offences.[4]

The last of these criticisms, if it were justified, illustrates, perhaps, what Lord Greene M.R. had in mind in *Young's* case when he exemplified a decision given *per incuriam* as one given in ignorance of a statute or a rule having the force of a statute. Whether it is justified in a case where the court must have had the relevant point in mind, any more than it was justified in *Gibson's* case [5] is doubtful. The second criticism demonstrates that one member of the Court of Appeal at least by this time was in agreement with the interpretation placed on the *per incuriam* principle by the Divisional Court. And, it is submitted, the first criticism, falling as it does, within none of the exceptions dealt with in *Young's* case, is based not on a point of substance, which, standing alone, would entitle a later court to decline to follow an earlier decision, but upon a procedural requirement which makes it easier for the court to say that the *per incuriam* principle applies.[6] That an earlier case has not been argued fully or at all, is, as it were, a desirable (though not an essential) precondition to a submission that the earlier court acted *per incuriam*, and is not itself the basis of such a submission, as Lord Goddard C.J. appeared to think.[7]

[19] [1948] 1 All E.R. 373.

[20] Tucker and Wrottesley L.JJ. and Vaisey J.

[1] Or as it is now put, so that the tribunal is " satisfied by the evidence so that it can feel sure " that the offence has been committed: *R.* v. *Summers* (1952) 36 Cr.App.R. 14.

[2] *Mordaunt v. Moncrieff* (1874) 30 L.T. 649

[3] s. 4, substituted for s. 178 (2) Supreme Court of Judicature (Consolidation) Act, 1925, which requires that the court on a petition for divorce shall be " satisfied " on the evidence that the case for the petition has been proved.

[4] See remarks of Evershed M.R. in *Morelle Ltd.* v. *Wakeling* [1955] 1 All E.R. 717–718.

[5] [1949] 2 All E.R. 985

[6] See *Morelle Ltd.* v. *Wakeling* [1955] 1 All E.R. 717.

[7] See *Penny* v. *Nicholas*, *supra*. And see also the remarks made by Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687 at 712.

Mucklow's Case

Some four years later the case of *Mucklow* v. *Inland Revenue Commissioners* [8] came before the Court of Appeal. The question in that case was whether or not on the construction of the statutes [9] the members of a director-controlled company in liquidation were liable to be assessed to surtax on the income of the company from the last accounting date to the date of winding up. The view of the law which had been acted on for many years was that an "automatic" liability arose in respect of such a period irrespective of whether the company had during such period made a reasonable distribution of its income (which would normally prevent liability arising).

This view was based on an earlier judgment of the Court of Appeal in *Collier (H) and Sons Ltd.* v. *Inland Revenue Commissioners* [10] where Slesser L.J. and Lord Hanworth M.R. were *ad idem* in interpreting section 31 (4) of the Finance Act, 1927, unfavourably to the taxpayer in the clearest terms.[11] In *Mucklow's* case [12] although rightly of the opinion that it was not strictly necessary for the court to decide whether or not *Collier's* case had been correctly decided [13] both Evershed M.R. and Jenkins L.J. dealt with *Collier's* case at length, and all three judges appear to have been of the view that *Collier's* case stood in the way of their deciding *Mucklow's* case as it ought to be decided. Evershed M.R. in the course of his judgment, levelled a telling criticism at certain of the views expressed by Slesser L.J. as to the meaning of section 21 (1) of the Finance Act, 1922,[14] (which was not directly in point) and went on to say that "it was argued that the error into which Slesser L.J. fell was nevertheless not essential to the ratio of his decision of the case. As a matter of strict logic, it

[8] [1954] 2 All E.R. 508.

[9] Finance Act, 1922, s. 21 (1) (now Income Tax Act, 1952, s. 245) and Finance Act, 1927, s. 31 (4) (now Income Tax Act, 1952, s. 253).

[10] [1933] 1 K.B. 488. This, it may be worth noting, was again a case argued on only one side.

[11] Romer L.J., the third member of the court, formed his conclusion on a different ground.

[12] [1954] 2 All E.R. 508

[13] Harman J., when the case came before him, sent it back to the Special Commissioners with a ruling that they need not consider that *Collier's* case constrained them to make an automatic direction, and that they must apply to a company in liquidation the same test of reasonableness of distribution that applied in the case of a company not in liquidation. Applying this test, the Commissioners found that the company had not made a reasonable distribution, and against this finding of fact the company appealed. Harman J. found that there was evidence on which the Commissioners could so find, and that they had not misdirected themselves and therefore dismissed the appeal. The company appealed to the Court of Appeal. A consideration of the effect of *Collier's* case was not therefore necessary to such appeal, although the point was raised and argued by the Crown.

[14] Slesser L.J. read this section to mean that tax liability was confined to the reasonable part of the company's income which should have been distributed. This is clearly wrong: if a reasonable distribution has not been made, tax is chargeable on the whole of the income.

may be that the conclusion was independent of the false premise. The question is, however, not whether as a matter of logic, the conclusion depended on the premise, but whether Slesser L.J. thought that his conclusion followed. . . ." [15]

One must entirely agree with what Evershed M.R. is here saying. A later court is bound by what it appears the earlier court thought was the correct conclusion from the given premises. It may be that such conclusion is logically incorrect; this does not matter provided that the earlier court expressed itself as thinking that such was the correct conclusion. Such conclusion then becomes a precedent [16] and, assuming that the point decided was not covered by previous authority, a later court cannot, if the rule in *Young's* case is to be strictly applied, refuse to follow such precedent on the ground that the reasoning of the court was faulty unless:

(a) it was so faulty because of ignorance or forgetfulness of a statute or statutory rule or

(b) it was so faulty because of ignorance or forgetfulness of a binding authority apart from statute,
and

(c) it is certain or at the very least highly probable that such faulty reasoning affected the court's conclusion.

To accede to the view that a later court can review the reasoning of an earlier court on the basis that such reasoning was logically faulty is, where the earlier court was seised of all the relevant authorities, to do more in the writer's submission than to apply an exception to the doctrine of *stare decisis*; it is to destroy the foundation of the doctrine itself.

It is for the above reasons that the criticisms which Evershed M.R. went on to make of the decision in *Collier's* case must be accepted with some misgiving. Evershed M.R. went on to say [17] that in his judgment the misapprehension under which Slesser L.J. laboured as to the effect of the 1922 Act affected his conclusion as to the meaning of the 1927 Act. Here he is suggesting what on the facts is very doubtful, that the erroneous view which Slesser L.J. took of the meaning of the 1922 Act was a false premise from which Slesser L.J. "thought that his conclusion followed." But the Master of the Rolls nowhere so states. He contents himself with suggesting that in some unspecified way this error affected his judgment [18] and neither he nor Hodson L.J.[19]

[15] [1954] 2 All E.R. 516.

[16] "The rule propounded and acted upon in giving judgment": *per* Lord Campbell in *Att.-Gen.* v. *Dean and Canons of Windsor* (1860) 8 H.L.C. 391.

[17] [1954] 2 All E.R. 516.

[18] "I am very far from satisfied that, if it had not been for his view of the effect of the original section . . . he would ever have formed the view which he did": [1954] 2 All E.R. 516.

[19] "This misapprehension would be expected to have affected his conclusion": *ibid.*, p. 528.

trace the manner in which such error was or was thought to be fundamental. Jenkins L.J. appeared to express no opinion on this point.[20]

This criticism was, however, followed by another. Evershed M.R. found that in *Collier's* case the material case of *Colville Estate Ltd.* v. *Inland Revenue Commissioners* [1] was not cited to the court and that the reasoning in *Colville's* case had subsequently been approved by the House of Lords in *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners.*[2] The Master of the Rolls is here, with respect, on stronger ground. The court was entitled to take the view that the reasoning of Slesser L.J. would have been different if the earlier case had been brought to his notice and to say that therefore the decision of the court in *Collier's* case was given *per incuriam.*[3] It is interesting to note that this is how the Master of the Rolls summarises the ground of the decision in *Mucklow's* case in the later case of *Morelle Ltd.* v. *Wakeling* [4] to which it is now proposed to refer.

The Principle Re-stated

Morelle Ltd. v. *Wakeling* was a case where the question was whether a company incorporated outside the United Kingdom and which held no licence in mortmain could validly take a transfer of a leasehold interest or whether upon such transfer the interest was forfeited to the Crown by virtue of section 1 (1) of the Mortmain and Charitable Uses Act, 1888. The matter had previously been before the court upon slightly different facts in the earlier case of *Morelle Ltd.* v. *Waterworth* [5] and the question arose in the Court of Appeal whether the earlier decision had been given *per incuriam* so as not to be binding on the later court.

It was contended by the Attorney-General as *amicus curiae* that the earlier decision had been given *per incuriam* in the first place because the arguments in the case had been brief and insufficient to deal with a specialised and highly technical branch of the law, and in the second place because in the earlier case the Crown had not been given the opportunity to appear and that therefore there was a deficiency of parties.

[20] "It is said that the misapprehension may have affected his view . . . I feel the force of this criticism": *ibid.*, p. 527.

[1] [1930] 2 K.B. 393. [2] [1942] 1 All E.R. 619.

[3] Admittedly *Colville's* case was concerned on its special facts with the propriety of a direction on a company under Finance Act, 1922, s. 21 (1), and it was admittedly necessary for Rowlatt J. to consider the meaning of that subsection. But in *Colville's* case the company was *not* in liquidation and Finance Act, 1927. s. 31 (4), was never considered. The view of the law in *Collier's* case had been acted on without difficulty or serious criticism for many years and had the virtue of simplicity. The effect of the decision in *Mucklow's* case is to make necessary certain mental gymnastics—see the remarks of Jenkins L.J. at p. 524 and the writer's criticism in *Taxation*, vol. 53 (1954), pp. 372–373.

[4] [1955] 1 All E.R. 708.

[5] [1954] 2 All E.R. 673. (The House of Lords has now disapproved of the decision in this case: *Att.-Gen.* v. *Parsons* [1956] 2 W.L.R. 153.)

Evershed M.R. giving the judgment of the court did not accept either of these arguments.[6] To have accepted the first would, in the court's view, necessarily have involved the proposition that it was open to the court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it was made to appear that the court had not, on the earlier occasion, had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, in the opinion of the court, open the way to numerous and costly attempts to reopen questions now held to be authoritatively decided. Another danger which the court regarded as attaching to such argument was that there might develop a tendency in cases of public interest and importance to ask a "full court" of five judges to reverse a previous decision of a court consisting of the normal number of three judges.[7]

Evershed M.R. also made it plain that the court was no more ready to declare that a previous decision had been given *per incuriam* where the facts of the case were unusual and complicated than in other cases; the matter was not one of degree but of principle. The principle as stated by the court [8] emphasises just those matters which, as has been said above, are essential to its efficacy. It must be shown that the earlier court acted in ignorance or forgetfulness of a statute, statutory rule, or binding authority, that such ignorance or forgetfulness caused an error either in a part of the decision itself or in some step in the reasoning, and that such error is "manifest." [9] The court made it clear that such an exposition of the principle was not necessarily exhaustive, that there may be cases where a decision might be held to have been given *per incuriam* where the above conditions were not present, but such cases (as was said in *Young's* case) would be of the rarest occurrence.

One can only venture the hope that the explicit statement of its position which the Court of Appeal has now been able to make will assist courts in the future to apply the *per incuriam* principle with clarity and consistency.

G. F. Peter Mason *

[6] [1955] 1 All E.R. 718.

[7] It was pointed out in *Young's* case that a "full" court had no greater jurisdiction or higher authority than a normal division of the court.

[8] "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong": *per* Evershed M.R., *ibid.*, p. 718. And see note by D. G. Valentine in (1955) 18 M.L.R., pp. 602–604.

[9] "It is . . . impossible to fasten on any part of the decision under consideration, or in any step in the reasoning on which the judgments were based, and to say of it 'Here was a manifest slip or error'": *per* Evershed M.R., *ibid.*, p. 718.

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AMELIORATING WASTE IN ENGLAND AND THE UNITED STATES

The rule has become well established in English law that a landlord may not recover damages or obtain an injunction against his tenant for years where such tenant has changed the course of husbandry of the property in such a way as to amount to ameliorating waste. We shall revert to this rule and to the phenomena of ameliorating waste in a few moments, but Dr. Cheshire has suggested that the Town and Country Planning Act, 1947, may become the means of encouraging courts to grant injunctions more readily against acts now considered as ameliorating waste,[1] and that in fact a change might take place in this intriguing backwater of English law. His remarks also throw some light upon an injustice which seems implicit in the law as it stands today, namely that the ameliorating quality of a change brought about in the course of husbandry by a lessee is judged according to the values of the day objectively, and not according to the personal values given to the change by the lessor. The fact that the lessor may have no desire for increased profit may have been overlooked,[2] but what appears to be the prevailing view in America takes such a desire into account, and it is the purpose of this article to elucidate the state of the law on this point in the United States, and to show how the Town and Country Planning Act may help us to acquire a more up-to-date rule in English law.

Let us pose a problem. A tenant has leased for a term of twenty years a farm which included a windmill pumping water for the farm, and he has covenanted, among other things, to repair the windmill and to insure it against destruction by lightning. After the lease has run for eighteen years the windmill is badly damaged by lightning, and the tenant pulls down what remains of it, constructing in its place a new shed containing an engine, which is more powerful and capable of producing more water than the old windmill. Does the action of the tenant amount to ameliorating waste, or is he guilty of ordinary voluntary waste? Has the property inevitably increased in value, or is it open to the landlord to insist that the tenant should have repaired the windmill and

[1] *The Modern Law of Real Property*, 7th ed., 1954, p. 199. This article is restricted to the relationship of landlord and tenant. The law of waste also applies in the case of a tenant for life, but the discussion will not be expanded to include the intricacies of settled land and trusts for sale.

[2] But compare *Doherty* v. *Allman* (1877) 3 App.Cas. 709, in which it is hard to think that such a desire can have been overlooked. The lessor was positively objecting to the conversion of dilapidated buildings into profitable dwelling-houses.

not replaced it by any other building or engine, however more efficient the new structure may be?

In seventeenth-century England a landlord similarly placed (given the possibility of some engine other than a windmill existing) would have been able to call the tune. Any change in the character or nature of the land or property was waste, whether the actual value of the property had been thereby improved or not.[3] As Dr. Cheshire himself points out, the reason was that the result was not only a change in the course of husbandry but also of the evidence of title.[4] The test of actionability in the earlier cases, therefore, was whether the act altered the nature of the land at all.[5] As with many branches of the law, however, the reason for the rule became outdated, and then, in distinction from many other branches of the law, the rule itself changed. Judges became inclined towards a new doctrine of ameliorating waste, and they began to distinguish between acts which might be construed as waste in the ordinary or indeed dictionary sense of the word,[6] and those which, though technically waste, caused no injury to the inheritance. In 1833 [7] the rule had become finally established that a lessor was not entitled to recover damages unless injury had been caused to the inheritance. In days gone by he might have demanded forfeiture and treble damages for the act of our hypothetical tenant,[8] but today the law would compel him to accept back the land with its "improvement" at the end of the current tenancy. There appears to be no room for doubt of this outcome. *Doherty* v. *Allman*, a House of Lords case of 1877,[9] is strong. A lessor had filed a bill of injunction against a tenant with a lease for 999 years who wished to convert broken-down store buildings into dwelling-houses. Authorities of the past century were cited against the lessor,[10] and the House (Lord Cairns L.C., Lords

[3] See *Wild* v. *Stradling* (1674) Finch 135.

[4] *Op. cit.*, p. 199.

[5] See *City of London* v. *Greyme* (1607) Cro.Jac. 182; *West Ham Charity Board* v. *East London Waterworks Co.* [1900] 1 Ch. 624; 6 Cornell L.Q. 124 (1920).

[6] For the history of waste see Holdsworth, *History of English Law*, vol. II, pp. 248–249; vol. III, pp. 121–123; vol. VII, pp. 275–281. On waste generally see Cheshire, *op. cit.*, pp. 198–203, 363; Woodfall, *The Law of Landlord and Tenant*, 25th ed., 1954, pp. 797–806; Yool on *Waste*, 1863.

[7] *Doe* d. *Grubb* v. *Burlington* (*Earl*) 5 B. & Ad. 507.

[8] The Statute of Gloucester, 1278, which provided for the special penalties of forfeiture and treble damages, was repealed by the Civil Procedure Acts Repeal Act, 1879, but these penalties are traditionally considered as having been abolished at the same time as the writ of waste by the Real Property Limitation Act, 1833, s. 36: see Woodfall, *op. cit.*, pp. 801–802.

[9] *Supra*; applied in the compensation case of *Re McIntosh and Pontypridd Improvement Co.* (1891) 61 L.J.Q.B. 164, to a rebuilding by a lessee having an unexpired term of years.

[10] For a full list consult the reports of *Doherty* v. *Allman*, *supra*, and of *Meux* v. *Cobley* [1892] 2 Ch. 253. The following cases are of importance in the line of authorities: *Harrow School* v. *Alderton* (1800) 2 Bos. & P. 86; *Barry* v. *Barry* (1820) 1 Jac & W. 651; *Jones* v. *Chappell* (1875) L.R. 20 Eq. 539.

O'Hagan, Blackburn and Gordon) refused the injunction in no uncertain terms. In his speech Lord Cairns was quite decided:

> "I doubt, further, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar." [11]

It should be noted, however, that the lease was so long that the lessor cannot have had any legitimate reason for an injunction on his own behalf. Even English law must recognise that a man's span of life cannot approach a thousand years.

Kekewich J. was equally clear on the subject in *Meux* v. *Cobley*.[12] There a tenant of farm land had covenanted to "manage the farm and every part thereof in a good, proper and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." He converted the farm into a flourishing market garden, and evidence was adduced that other farms in the neighbourhood had been so converted, it being found the most profitable mode of cultivation. "I have to consider whether a farm is less a farm because it is converted into a market garden," said Kekewich J.,[13] and he held that there was no breach of covenant, and that there was no waste that was actionable, adopting the decision in *Doherty* v. *Allman* [14] as his principal authority. A confusing element in the learned judge's decision is that he went on to opine that the Agricultural Holdings (England) Act, 1883, which gave to tenants the right to compensation for "improvements," went a long way towards abolishing the old common law doctrine of waste, and that many actions by tenants could now be brought under the heading of "improvements" under the Act.[15] The headnote to the report shows that the reporter felt the case to spell the doom of the doctrine. Yet his dictum does not appear to have affected the law developed by that date, and the learned editors of the 1954 edition of Woodfall [16] assume that the state of the law today remains as we have outlined it above. It is true that this portion of English law does not provoke a great deal of litigation, but the Privy Council expressly followed *Doherty* v. *Allman* in 1902,[17] and the House of Lords did likewise in *Hyman* v. *Rose*.[18] In the latter case the tenant converted premises into

[11] 3 App.Cas., at p. 723.
[12] *Supra*.
[13] *Ibid.*, at p. 263.
[14] *Supra*. His other main authority was *Jones* v. *Chappell*, *supra*.
[15] [1892] 2 Ch., at p. 264.
[16] Woodfall, *op. cit.*, pp. 797–798.
[17] *McEacham* v. *Colton* [1902] A.C. 104, an appeal from the Supreme Court of South Australia, in which the actual decision was that negative covenants (here a covenant not to assign without the lessor's consent) would be enforced by injunction.
[18] [1912] A.C. 623, reversing [1911] 2 K.B. 234, where the Court of Appeal had distinguished *Doherty* v. *Allman*.

a cinema, depositing money with his landlord to pay for reconversion at the end of the lease, which still had some thirty years to run. His alterations were held not to amount to actionable waste.

Turning to the United States one should remember that the law varies from state to state, but it has been possible to trace the trend of decisions in this field throughout the whole country as a fairly uniform process. The development from the seventeenth-century English cases contrasts with the modern English presumption that any change in the use or nature of the property is waste of some sort. Cases in many states during the nineteenth century show that it was the constant usage of farmers to break up their grass and otherwise to change the use and cultivation of their lands as conditions have required. The presumption has been against the change amounting to waste at all,[19] and a tenant did not commit waste by converting woodland to the plough nor vice versa.[20] The law of waste accommodates itself to the varying needs, conditions and usages of different lands within what is popularly known as the common law world,[1] but a doctrine of waste has been held to apply in many cases within the United States where an act of the tenant is prejudicial or has worked substantial injury to the inheritance.[2] In a 1914 Missouri case the term waste was defined narrowly to mean the spoil or destruction of an estate either in houses, woods or lands by demolishing the very substance of the thing.[3] From this point the law of ameliorating waste has developed, and such ameliorating waste has been defined as the act of a tenant technically constituting waste, yet actually resulting in an improvement or increase in the value of the property.[4] Thus in the Florida case of *Stephenson* v. *National Bank of Winter Haven* the cutting down of valuable timber was held to constitute ameliorating waste, because the rental value of the cleared land had been increased by the action of the tenant.[5]

It seems, therefore, that the objective test of ameliorating waste, namely whether the change brought about by the tenant has

19 See *Pynchon* v. *Stearns*, 11 Metc. 304 (1845), a Massachusetts case; 14 Harv. L.R. 226 (1900).

20 *Crockett* v. *Crockett*, 2 Ohio St. 180 (1825); *Keeler* v. *Eastman*, 11 Vt. 293 (1838); *Proffitt* v. *Henderson*, 29 Mo. 325 (1860); cases in Ohio, Vermont and Missouri.

1 See 67 Corpus Juris, "waste," ss. 9, 11; also *Boefer* v. *Sheridan*, 42 Mo.App. 222 (1890)—a Missouri case.

2 Missouri appears to have been a rich ground for litigation on this subject: *Proffitt* v. *Henderson*, *supra*; *Van Hoozer* v. *Van Hoozer*, 18 Mo. 19 (1885); *Deltenre* v. *Deltenre*, 152 Mo.App. 487 (1911); *Mize* v. *Burnett*, 145 S.W. 151 (1912); see also *Bandlow* v. *Thiem*, 53 Wis. 57 (1881), a Wisconsin case.

3 *First National Realty and Loan Co.* v. *Mason*, 185 Mo.App. 37.

4 *J. H. Bellows Co.* v. *Covell*, 25 Ohio App. 277 (1928); *Palmer* v. *Young*, 108 Ill.App. 252 (1903) (Illinois); *Kretzer Realty Co.* v. *Thomas Cusack Co.*, 196 Mo.App. 596 (1916); *Cawker* v. *Trimmel*, 155 Wis. 108 (1913); *Shepard* v. *Shepard*, 3 N.C. 382 (1801) (North Carolina); *cf. Chase* v. *Hall*, 41 Mo.App. 15 (1890); and see 38 Col.L.R. 532 (1938).

5 92 Fla. 347 (1926).

increased the value of the property, left it unaltered or decreased it, may well have been applicable in the United States as well as in England. But McAdam, in commenting on the law in Ontario, has declared:

> "In an action on the case in the nature of waste, the jury, in estimating the damages, are not to take into consideration whether the general value of the premises has been enhanced or depreciated by reason of the act of the defendant, but simply whether they are depreciated as to the plaintiff." [6]

The *Restatement* [7] places the test of a landlord's right to a remedy [8] upon the existence or otherwise of a "reasonable ground of objection" to the alteration.[9] He would have reasonable ground for objection thereto when such alteration or replacement lessened, or would tend to lessen, the market value of the interests of the owner.[10] The *Restatement* does not deal with the converse case directly, although it poses the extreme example of a substantial and permanent change in the conditions of the neighbourhood depriving the land in its existent form of reasonable productivity or usefulness. There the proposed alteration or replacement would be one which the owner of an estate in fee simple absolute would normally make, and he would not therefore be able to object to similar action taken by his lessee.[11] One cannot but agree with this position, but the trend indicated by McAdam has been substantiated positively in an Alabama case of 1920, *F. W. Woolworth Co.* v. *Nelson*.[12] There a landlord applied for an injunction to prevent his tenant's proposed alterations in his building. He maintained, among other things, that the proposed alterations would increase the insurance premiums payable on the building, and the court granted an injunction, such changes being deemed waste, even though they would have enhanced the value of the property: the ameliorating element was not sufficient as far as the landlord was concerned personally. In a note on this case one writer felt the decision strong enough to warrant the following note:

> "Nevertheless there is, it seems, a more fundamental consideration which has moved the courts to regard as waste any considerable alteration by the tenant in the premises leased, namely that, by a lease, the lessee is given merely the right to use and not the right to alter the premises, and that the lessor has a right to receive back, at the end of the term, the very thing he has leased. . . . The fact that the alterations

[6] McAdam, *Landlord and Tenant*, vol. II, s. 305, p. 1291.
[7] American Law Institute *Restatement of the Law of Property*, vol. I, s. 140.
[8] And it considers a remainderman to be in the same position.
[9] *Op. cit.*, p. 462.
[10] *Op. cit.*, p. 467.
[11] *Loc. cit.*
[12] 204 Ala. 172. Other cases of both the nineteenth and twentieth centuries show some support of principle for this decision: *Proffitt* v. *Henderson*, 29 Mo. 325, at p. 327 (1860); *Melms* v. *Pabst Brewing Co.*, 104 Wis. 7 (1899); and *Keogh* v. *Peck*, 316 Ill. 318, at p. 325 (1925).

> will enhance the value of the premises should not give the tenant a right to alter them, because, in the first place, it may be that for the purposes of the lessor the alterations are of no advantage whatsoever, and in the second place, even if they are to his advantage, the tenant cannot force him to accept the change, since it is very obvious that a person cannot force another to accept a benefit. . . . The ruling of the Alabama court in the principal case seems in accord with reason as well as authority." [13]

Even though the change may have increased the objective value of the property, the act will constitute waste if it is not to the liking of the lessor. Insofar as it is possible to generalise, the trend of decisions in this field of law has been practically uniform throughout the states of the Union, and it would seem reasonable to suppose that this uniformity will continue. Since the *Woolworth* case is of such a comparatively recent date, therefore, it is perhaps justifiable to accept the above statement as the prevailing American view on the subject in this century. It would be wrong to put it forward as anything more strong than a viewpoint, for it is not the utterance of a judge, even though it follows the *Woolworth* decision closely; and it should be remembered that no one state's law is of more than persuasive effect upon that of another state: conflicting lines of decisions sometimes exist even at the present day within the law of a single state.[14]

How does our fact situation stand up under the American view? Perhaps it is natural for a lessor to prefer his property returned to his possession in its former state on the falling in of the lease. One writer has suggested that a lessor with this desire in mind can fully protect himself by covenants and conditions,[15] but it is our submission that this is not enough. The law should aid the owner of property in his attempts to control the nature of that property, and should provide against the contingency of a prohibition in the lease against alterations being absent. The engine that has taken the place of the windmill is capable of increasing the volume of water pumped, but the landlord may not want any more water to supply the farm and buildings. On the contrary he may have had personal reasons for wishing the windmill restored to its former state—perhaps a combination of sentimental feelings and the realisation of the cost of maintaining and running the engine. Even if the leasing value of the premises has been increased by the alteration, this would not affect an owner who did not plan to lease the premises or the land again after the present lease has fallen in. Nevertheless in our hypothetical case English law seems clear that he would have to accept his property back

[13] J. Servera, 6 Cornell L.Q. 124, at p. 125 (1920).

[14] Illinois, with the antiquated and unnecessarily complicated hierarchy of courts in Chicago, is a case in point.

[15] 2 So.Cal.L.R. 399 (1928).

at the end of the lease in its improved state, whereas in the United States the owner would probably have the right to insist on the rebuilding of the windmill.

It may be argued that the English rule is now too well established to allow for any change. The binding nature of two decisions in the House of Lords [16] and the weight of one by the Judicial Committee of the Privy Council [17] would seem an impossible obstacle, even if the *ratio decidendi* in *Doherty* v. *Allman* [18] may not exist in many cases. Yet it is here that Dr. Cheshire's hint is important. In referring to the Town and Country Planning Act, 1947, he says:

> "To convert land to a more profitable use will in most cases involve a material change in its user. It will, therefore, constitute 'development' within the meaning of the Act and will require the permission of the Planning Authority. It follows that if the landlord disapproves of the change, he will be unable to reconvert the land at the end of the tenancy to its former use unless he also obtains permission, for the reconversion will equally be development. Perhaps, therefore, the court might now be more ready to grant an injunction at his instance against even ameliorating waste." [19]

In our case there is no change of user, but in most cases there will be such a change, as where the windmill was not damaged by lightning, but the engine was installed so that a different system of irrigation would enable the tenant to change the nature of the farm from sheep-breeding to the intensive cultivation of crops.[20] The clue may lie, therefore, in the nature of each improving act proposed by the tenant. A proposal which amounts to "development" under the Act will put a disapproving landlord to great inconvenience and perhaps expense. It is true that a change of use was "development" under the rules of planning law long before the Act of 1947,[1] and it is also true that the Court of Appeal in 1938 [2] held by a majority that the question of improvement in premises must be regarded from the standpoint of the tenant, yet unless the court is to press the objective view of the proposal beyond the tenant's wildest dreams, it must hold the carrying out of such a proposal as causing an injury to the inheritance, and thus by no means of an ameliorating quality. In this way

[16] *Doherty* v. *Allman* and *Hyman* v. *Rose*, *supra*.
[17] *McEacham* v. *Colton*, *supra*.
[18] Pointed out in the discussion of that case, *supra*.
[19] *Op. cit.*, p. 199.
[20] This would not be such an impossible change as it may sound. Elveden, a 23,000-acre rabbit warren on the Suffolk moors had been developed by the Maharajah of Indore into one of the greatest private bird-shoots in England. The first Earl of Iveagh entertained King Edward VII and King George V at many shooting-parties there, and yet his successor, in the late 1930's, converted it into what is now one of the most productive general farms in the country.
[1] See Town and Country Planning Act, 1932, s. 53.
[2] *Lambert* v. *Woolworth* [1938] Ch. 883.

the tide of the law on the point may be turned, and although this may not have been one of the direct objects of the legislature it would introduce the justifiable side-result of a more healthy rule in favour of those who own and, in the long run, care for their property.

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JARGON AND OCCULT QUALITIES

When Austin rejects Bentham's definition of status as "jargon about occult qualities,"[1] the phrase has a familiar ring. It might well have been used by a rhetorically inclined member of one of the analytical schools of philosophy about the metaphysics of a Platonic or near-Platonic theory of universals. The conflict which it typifies between two views of abstract terms[2] ranges over the whole field of human thought; in particular it can be considered as a general problem of the language of jurisprudence.[3] The purpose of the present study, however, is much narrower. It is to consider the nature and effect of this conflict so far as it impinges on our thinking about the concept which Austin himself was considering—that of status—and in particular about status in the English Conflict of Laws.[4]

The Issue Joined

Austin himself certainly has no commerce with the "occultism" which he detects in others. As Professor Graveson points out,[5] he took the function of status to be merely a matter of the arrangement of the law for the sake of convenience.[6] As a matter of pure analysis, it seems hard to dispute that this function of status is one of primary importance. A rule of law will normally deal with a legal person in a factual situation. If the same type of situation is governed by the same or similar rules whatever the characteristics of the persons involved, it will be natural to deal with those rules under some branch of the Law of Things,

[1] Graveson, *Status in the Common Law* (1953), 6.

[2] Beale denies that status is a "pure abstraction" (*Conflict of Laws* (1935), § 119.1, p. 649), but it is difficult to follow his exposition on this point.

[3] The close connection between philosophy and jurisprudence is, of course, commonplace, although there is surprisingly little literature working out the connection as it applies to detailed juristic problems.

[4] Since almost everything that will be said in the following pages will focus on the meaning of status, it is difficult to give a dogmatic definition at the beginning. Perhaps the approach adopted can be summarised by saying that status is not a concept to be defined *a priori*, with attributes which can be deduced by a process of pure thought from the definition. A working definition must be ostensive, and follow established usage. Status in the English Conflict of Laws, as studied here, may with these reservations be defined as the legal consequences to a person of being married, under age, in wardship, a slave, bankrupt, or in any similar position sufficiently set apart from that of other persons not so placed as to require special conflicts rules. Lists of many different forms of status can be found in Graveson: *op. cit.*, 2, and Allen, "Status and Capacity" (1930) 46 L.Q.R. 277, at p. 284.

[5] *Op. cit.*, 5.

[6] Campbell, *Analysis of Austin's Lectures on Jurisprudence* (1877), 137.

and this sort of treatment will give rise to generalised concepts such as those of property, possession, etc. If, on the other hand, a class of persons is marked off from others by being subject to rules peculiar to itself in a wide range of factual situations, a branch of the Law of Persons will develop around that class, and membership of it will amount to a status.[7] So Austin comes to the conclusion that the distinction between status and any other bundle of rights, duties and capacities inherent in a person is not susceptible of any strict definition.[8] He finds that status usually has certain characteristics, which he lists, but these characteristics are to be observed empirically, not regarded as distinguishing marks of a *qualitas* attaching to a particular person, as the civilians supposed, nor as predetermined consequences of some investitive fact, as Bentham would have it.[9]

Austin is not alone in adopting an analytical approach. Thus we find Holland[10] defining a natural person as a human being regarded by the law as capable of rights and duties, as "having a status," and other leading writers take a similar view.[11]

That view has, as might be expected, not passed unchallenged. (Indeed, although Sir Carleton Allen refers[12] to the "vague and popular" interpretation of status espoused by the analysts, it may be wondered whether there are not equally strong forces of popularity working in favour of a more metaphysical outlook, in view of the tendency to ascribe a real existence to any concept which has been named.) The views of Bentham and the civilians, which Austin impartially attacked, are not identical, and modern exponents of a more metaphysical doctrine concentrate on the civilians' notion of a "quality" of the person rather than on Bentham's "investitive fact." Three outstanding contributions to the thought on the subject which derive their inspiration from some such view must be mentioned in particular.

Beale defines status as a personal quality or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third parties and the state are concerned.[13] An important feature of his very thorough treatment of the individual examples of status is his application of this definition so as

7 *Cf.* Rabel's reference to the "personal law" of the medieval statute theory in his *Conflict of Laws* (1945), Vol. I, 101; and Hughes, *Jurisprudence* (1955), 180.

8 Campbell, *op. cit.*, 137.

9 *Ibid.*, 139.

10 *Jurisprudence* (13th ed., 1924), 94.

11 *e.g.*, Salmond, *Jurisprudence* (10th ed., 1947), 257, where status is defined as the sum total of a man's personal, as opposed to proprietary, rights and duties; and Westlake, *Private International Law* (7th ed., 1925), 49, "What is status except the sum of the particulars in which a person's condition differs from that of the normal person?" See also "A Note on Status" (1938) 54 L.Q.R. 400, by J. G. Starke.

12 "Status and Capacity" (1930) 46 L.Q.R. 277, at p. 279.

13 *Treatise on the Conflict of Laws* (1935), § 119.1, p. 649.

to exclude from the category of status many conditions which would normally be classed as such.[14]

An important study of the nature of status is to be found in Sir Carleton Allen's " Status and Capacity." [15] Here elements from Maine and Austin are combined in a definition of status as the condition of belonging to a particular class of persons to whom the law assigns certain peculiar capacities or incapacities.[16] In spite of the incorporation of Austin's notion of a determinate class, however, the emphasis is on the " extrinsically determined quality " of status; its essence lies in the fact of membership of the class, and not in the abilities or disabilities entailed. The distinguishing mark of a class for the purposes of status is that legal consequences result to its members from the mere fact of belonging to it.[17]

The most complete survey is Professor Graveson's *Status in the Common Law*. Status is a " special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern." [18] Professor Graveson, like Sir Carleton Allen, emphasises that he regards status as something apart from and beyond its incidents. " The status of a child is not his duties or disabilities in relation to his parents, but the legally recognised fact of being a child." [19] [20]

The Issue Examined

It will be apparent that the exponents of both what we have called the analytical and the metaphysical views consider the issue between them to be of substantial importance, and we must now consider its nature more closely.

The main point is whether a status is merely the sum of its incidents or has some kind of independent existence. Now, in a sense, it might be supposed that this could be settled authoritatively as part of the general philosophical problem of universals without reference to specifically legal theory. It is not for a layman in philosophical matters to say what form such a settlement would take, and no doubt it would be more subtle than the simple alternative posed above would suggest, but certainly the trend of

[14] He expressly excludes prodigality (*ibid.*, § 120.8, p. 658), insanity (§ 120.9, p. 658) and minority (§ 120.12, p. 661), and makes no reference to many other matters normally included in lists of status.

[15] (1930) 46 L.Q.R. 277.

[16] *Ibid.*, 288.

[17] *Ibid.*, 289.

[18] Graveson, *Status in the Common Law* (1953), 2.

[19] *Ibid.*, 141. See, however, the analysis at pp. 122–127.

[20] For other authorities tending towards this side of the debate see Wolff, *Private International Law* (2nd ed., 1950), 277–279; Cheshire, *Private International Law* (4th ed., 1952), 149; and Paton, *Jurisprudence* (2nd ed., 1950), 322.

thought seems for long to have been away from Plato's theory of the existence of ideal Forms,[1] to which the metaphysical view of status obviously has a close affinity.[2] It does, indeed, seem impossible to frame a coherent idea of, say, slavery, viewed as a concept of the law and yet devoid of any legal consequences. One writer who does attempt to give life to this empty shell is Rabel, who gives examples of the effects of "recognition without enforcement" in the case of a foreign divorce.[3] These effects, however, are either purely conventional and devoid of legal significance,[4] or else true examples of what he denies them to be, namely incidents of status in the normal sense.[5]

It would, however, be superficial to imagine that the problem can be disposed of by the easy method of dismissing it as merely a matter of philosophical theory, irrelevant to the lawyer's practical problems. Although we have, for the sake of brevity, referred to one view as "metaphysical," those who hold it are saying something important which cannot justly be appreciated if criticised as metaphysics alone. One influence at work is the desire to relate the law to its social context and to avoid intellectual aridity. An interesting and perhaps instructive parallel is to be found in the judgment of Denning L.J. in *Bonsor* v. *Musicians' Union*.[6] The question was whether a trade union is a legal entity, and the learned Lord Justice begins by asserting that it has in fact a personality of its own distinct from those of its members. He continues:—

> "I take it to be clear, therefore, that a trade union is an entity in fact. The question is whether it is also an entity in law."[7]

Thus, although Denning L.J. does not claim that the legal personality of the union follows of necessity from what he considers its factual personality, he brings the latter into the forefront of his argument. And certainly it must be supposed that, other things being equal, the more closely concepts of law follow lay habits of speech the better. Nor would it be much to the point to conduct a philosophical analysis of the learned Lord Justice's assertion that a trade union is a factual entity. The importance which he attaches to that assertion would seem to lie not in its abstract truth but in its reflection of the habits of thought of

[1] *Cf.* the rather deprecatory note at p. 473, n. (45), of Dicey, *Conflict of Laws* (6th ed., 1949).

[2] The affinity is noticed in Cleveland, "Status in Common Law," 38 Harv.L.R. (1925), 1074, at p. 1079, where Beale is described as "dividing status into protecting static rights or incidents, on the one hand, and the indestructible residuum of a Platonic Idea on the other."

[3] *Conflict of Laws* (1945), Vol. I, 482–483.

[4] *e.g.*, the effect on the wife's name.

[5] *e.g.*, the significance of divorce as evidence of freedom to remarry.

[6] [1954] Ch. 479, at p. 507.

[7] *Loc. cit.*

those who have to deal with trade union affairs in the everyday world.

This, perhaps, affords a clue to the reasons which impel jurists to insist on the existence of infancy and the other forms of status as such. There is little doubt that such an approach reflects accurately the forms of thought of the normal person not engaged in legal analysis.[8] It is quite natural to regard a status as something existing in its own right, independently of its legal results.

The question remains whether it is profitable to do so. Although it will usually be one object of legal usage to adopt the categories current in lay circles so far as possible, there are other considerations involved which in some situations oppose and may well override this one on a just weighing of values. In fact the question whether it is more profitable to take one view of status or the other immediately provokes the answering questions:—"Profitable in what field?", "Profitable to what end?"

The Issue Confined

It follows that there is not necessarily a unique answer to the question we have posed; we must distinguish. From a lawyer's point of view an obvious primary division is that between legal and non-legal studies. In the work already cited[9] Professor Graveson rightly emphasises the sociological and economic functions of status, and its importance in legal and social history needs no emphasis in view of Maine's famous aphorism.[10] All these studies are, at most, on the fringe of law—at any rate of lawyer's law—and as such need no further attention here. In their case there are obvious attractions in rejecting what must often, where a broad sweeping view is needed, seem the incoherence of the analytical approach, but in moving on to strictly legal topics it may be necessary to guard against importing habits of thought helpful elsewhere but in the narrower sphere a disadvantage.

Within the field of strict law the distinction of capital importance is that between the rules of the Conflict of Laws and all other legal rules. Although rules as to status are by no means always treated as a coherent body of law in works on the Conflict of Laws, the approach there is altogether more consistent and technically developed than that elsewhere, as a glance at the index of, say, Halsbury's *Laws of England* will show.

The chief reason for this sharp distinction between the treatment

[8] The tension between the need to develop an exact technical vocabulary and the often opposing desire to retain meanings comprehensible to the layman is well brought out by Professor Edwin W. Patterson in his *Jurisprudence* (1953), § 3.27, p. 296. See also pp. 194, 249 and 252 *et seq.*

[9] *Status in the Common Law* (1953).

[10] *Ancient Law* (1920 ed.), 174, "the movement of the progressive societies has hitherto been a movement from Status to Contract." See also Pollock's editorial note at p. 183. *Cf.* Graveson, *op. cit.*, 47–48.

of status inside and outside the Conflict of Laws is the greatly enhanced importance of classification and classificatory terms in conflicts cases. In municipal law, classification is chiefly a matter of the systematisation of rules for ease and convenience of study.[11] It is natural that general categories to which common rules apply will often form the basis of the classification used, but that is as far as it goes. In the Conflict of Laws, however, classifications of this kind themselves become the basis of further rules, both as to jurisdiction and choice of law. Thus in municipal law there is a branch called "procedure," but that heading possesses no magic which alters the handling of the rules it comprises. In a conflicts case, however, to classify a rule as procedural is immediately to bring into operation the choice of law rule that the *lex fori* must apply.[12]

We shall therefore be justified in concentrating in the remainder of this enquiry on the comparative influence and value of the two contrasting views of status in the Conflict of Laws, and in not being perturbed if our conclusions are little dependent on the position in extra-legal studies, or in other branches of the law.[12a]

The Issue and the Field of Battle

There are, it would seem, two main ways in which theoretical differences of the kind we are considering have their outcome. The first is in the interpretation and exposition of existing rules. This is especially important in a common law system, where principles must be extracted from a multitude of individual cases. The value of a general theory will clearly depend in this respect largely on its success in bringing into view a coherent and persuasive pattern underlying the apparent chaos of an unedited digest of the cases. The second means by which basic theoretical assumptions will make their presence felt is their influence on current decisions and future trends, and here it is worth noting that the Conflict of Laws is one of the few branches of English law in which the opinions of textbook writers have a substantial effect on judicial thought and decision. The two categories are closely connected, but there is an important difference in the criteria of value to be applied within each. In the first the test is largely objective —a matter of efficiency in producing what is agreed to be a desirable result. In the second it is bound to be subjective, at

[11] See a study of the different kinds of classification in Wolff, *Private International Law* (2nd ed., 1950), 147.

[12] Another reason for treating the Conflict of Laws separately is that it is a branch of the law which the layman has little occasion to use without consulting a lawyer, and there is therefore less harm here than elsewhere in developing a technically exact approach at the expense of some divergence from popular usage. See Patterson, *Jurisprudence* (1953) § 3.21, at p. 258.

[12a] On the two preceding paragraphs, see now Hughes, *Jurisprudence* (1955) 175–176.

least to the extent to which the value judgments made in comparing different legal and sociological results are themselves subjective.

The Field Surveyed

First, then, which of the two views which we are considering will explain the brute facts of the existing legal rules the more simply and adequately? Our raw material here consists of a number of reported cases in which one of the persons whose rights are in question has a status, according to the law which one party alleges to be applicable, which he does not possess according to the law championed by another party; or else he has the same status according to both laws, but the effects of that status differ according to the law applied. Usually one of the legal systems (there may be more than two) will be English.

The first point to notice is that the case of a different status and that of the "same" status with different effects are indistinguishable in principle. If the effects of a status under one law are different from those of the corresponding [13] status under another then the fact that there are enough similarities for them to receive the same name (or, in cases of language difference, for the name of one to be translated by that of the other) does not prevent the judge from having to face the same essential problem as when the two competing forms of status are openly recognised as being distinct, or even opposed, and are given different names.[14] The differences are of degree, and, while cases at the two extremes of the scale may well call for contrasting treatment, it should not be assumed that the line between them for the purposes of legal rules should be drawn in the same place as marks the change in linguistic practice.

This caveat having been entered, an attempt can be made to discover how the courts have dealt with some typical cases at different points along the scale, and to enquire how the decisions can best be explained. As an example at or near one extreme we may take the status of marriage. In *Hyde* v. *Hyde* [15] Lord Penzance pointed out that although the incidents of marriage vary in different countries it has essential elements and invariable features. "Marriage is one and the same thing substantially all the Christian world over." [16] One would expect the result of this view to be that the courts would divide foreign marriages into two sharply contrasted categories. On the one hand, those which were accepted as being within the formula enunciated in *Hyde*

[13] The word "corresponding," of course, really begs the question, but it has the advantage of brevity, and the meaning, it is hoped, is clear.

[14] *Cf.* Patterson, *Jurisprudence* (1953) § 3.21, at p. 253.

[15] (1866) L.R. 1 P. & D., 130, at p. 133.

[16] *Ibid.*, quoting from *Warrender* v. *Warrender*, 2 Cl. & F., 488, at p. 531.

v. *Hyde* [17] would be recognised for all purposes as valid; on the other, those which were unacceptable by the same test would be refused any kind of recognition.

Judges have often, although less so now than formerly, used language conforming to these expectations. *Brinkley* v. *Att.-Gen.*[18] should perhaps not be given too much weight in this respect, as it was a petition under a statute [19] which provided expressly for a declaration in general terms that a marriage was valid, but in *Nachimson* v. *Nachimson* [20] the approach was the same. These were cases where the marriage was recognised; among those where validity was absolutely denied we need notice only the sweeping language of Lush L.J. in *Harvey* v. *Fernie*,[1] and of Stirling J. in *Re Bethell*.[2]

We must, however, look at what the courts actually decide as well as at what the judges say they are deciding. When the matrimonial status of a person comes in question in an action it does not do so in the abstract; it does so as the result of an attempt by one party to enforce an incident of the status of marriage, either directly or as a necessary link in his chain of evidence. He may be persuading the court to exercise its matrimonial jurisdiction, or asserting his right to property under a title depending on the validity of his or his parents' marriage; the validity of a marriage may be relevant in a prosecution for bigamy, in taxation and estate duty disputes, and in claims to benefits under social services; it may come in question in the Queen's Bench Division during a running-down case brought by the victim's widow, or in the Chancery Division where another widow's life interest is determinable on remarriage.[3] It can hardly be doubted, as a matter of principle, that in each case the binding authority of the court's decision is limited to the particular branch of the law in issue. Only if all or virtually all of the decisions on the various incidents of marriage were to the same effect for a particular set of circumstances would it become correct to speak of the "validity" of the marriage without further qualification.

[17] *Loc. cit.*, "Marriage is the voluntary union for life of one man and one woman, to the exclusion of all others."

[18] (1890) 15 P.D. 76.

[19] Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93). See now the Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 17.

[20] [1930] P. 217.

[1] (1880) 6 P.D. 35, at p. 53—"there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country . . . our laws do not recognise a marriage solemnised in that country, a union falsely called marriage. . . ."

[2] (1887) 38 Ch. D. 220, at p. 234—"a union formed between a man and a woman in a foreign country, although it may there bear the name of marriage . . . is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom."

[3] See the examples collected in Cheshire, *Private International Law* (4th ed., 1952), 280.

In fact there is no such uniformity. Taking first the type of case in which validity has been completely denied, we find that in spite of these denials polygamous marriages have been recognised for the purpose of creating incapacity to contract a subsequent monogamous marriage,[4] and there seems little doubt that the same principle applies when the marriage is invoked for other appropriate purposes.[5]

The opposite case—that where the foreign marriage is a "Christian" marriage within the *Hyde* v. *Hyde* formula—seems at first sight more favourable to the concept of universal validity. An insistence on examining the practical results of the decisions, however, shows that this is an illusion. A wife, married and domiciled abroad, may be petitioning for divorce under section 18 of the Matrimonial Causes Act, 1950,[6] while her husband sues in another Division for the recovery of movables which he alleges to have undergone an assignment by law to him on the marriage. Both courts may "recognise" the "validity" of the marriage, but whereas in the property case the incidents of the marriage status to be enforced will be those of a foreign law,[7] in the divorce they will be those of English law.[8]

The condition of infancy or minority exemplifies a rather different type of status. Like marriage, it is a "natural" status, but its limits and effects vary so much that it has never been suggested that it is "one and the same thing substantially all the . . . world over." The variations are so marked and the cases so few that there has been little attempt to relate the various incidents of non-age to each other.[9] Incapacity to contract is the subject of one unsatisfactory case[10] where no evidence of the relevant foreign law was given, and capacity to receive a legacy has been dealt with even more summarily.[11] The age of marriage is affected by the confusion existing in the Conflict of Laws as to capacity to marry in general. The criminal responsibility of minors

[4] *Srini Vasan* v. *Srini Vasan* [1946] P. 67; *Baindail* v. *Baindail* [1946] P. 122.

[5] *e.g.*, succession; see *Sinha Peerage Claim* [1946] 1 All E.R. 348, and the judgment of Lord Greene M.R. in *Baindail* v. *Baindail* (*supra*), at p. 129.

[6] 14 Geo. 6, c. 25.

[7] *Sawer* v. *Shute* (1792) 1 Anst. 63.

[8] This is now provided by statute in cases under the Matrimonial Causes Act, 1950, s. 18, but it would seem to have been the law in any case: Graveson, *Conflict of Laws* (1st ed., 1948), 314. *Cf.* also the rules as to the authority of the husband over the person of the wife, considered in Dicey, *Conflict of Laws* (6th ed., 1949), 480.

[9] But infancy is included in the examples of "domestic status" stated to be governed by the law of the domicile given in Graveson, *Conflict of Laws* (3rd ed., 1955), 111.

[10] *Male* v. *Roberts* (1790) 3 Esp. 163. Such authority as the case has is usually taken to indicate that the *lex loci contractus* applies.

[11] See *Re Hellman's Will* (1866) L.R. 2 Eq. 363, which decides that capacity exists if conferred either by the law of the testator's domicile or by that of the legatee's. *Re Schnapper* [1928] Ch. 420, is to the same effect.

is not usually dealt with in the Conflict of Laws, but no doubt choice of law follows jurisdiction.

As an example of a more artificial status we may take guardianship. In spite of earlier decisions apparently to the contrary [12] it is now clear that English courts will not enforce the incidents of a foreign guardianship as such.[13]

Finally, we may look briefly at slavery. Its incidents are not enforced in this country,[14] and some authorities [15] place it in a special "penal" class, denied any recognition by English law. It is difficult to see the practical effect of this classification, for even here the intraterritorial effects of a foreign status are allowed.[16]

The Field Contested: (1) Tactics

How do the two rival theories explain this raw material? The metaphysicians, being committed to the view that status exists in its own right, must first decide which law is to govern each particular status. It is then a usual, if not necessary, corollary that the status created by that law is of universal effect. Thus Professor Graveson states that "the law of a person's domicile . . . governs the creation, duration, nature and determination of any domestic status which is imposed on him," [17] while guardianship is a matter for the *lex patriae*,[18] although Beale counts it as a domestic status subject to the *lex domicilii*.[19] The doctrine of universality is expounded in its most extreme form by Scott L.J. in his dissenting judgment in *Re Luck*.[20] He states that "an English court cannot reject, qualify or make an exception from the context of the foreign status, unless there is some definite and positive rule of English law [to the contrary]."[1 2]

This quotation leads us conveniently to a statement of two

[12] *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704; *Re Savini* (1870) 22 L.T. 61.
[13] *Re B's Settlement* [1940] Ch. 54.
[14] *Sommersett's Case* (1772) 20 State Tr. 1.
[15] *e.g.*, Halsbury's *Laws of England* (3rd ed.), VII 71, n. (u). See also the citations in Cheshire, *Private International Law* (4th ed., 1952), 147, although the learned author himself takes the contrary view.
[16] As in *Santos* v. *Illidge* (1850) 3 L.T. 155, where a contract for the sale of slaves was enforced, as being valid by the Brazilian *lex loci contractus*.
[17] *Conflict of Laws* (3rd ed., 1955), 111.
[18] *Op. cit.*, 174. See also the list of other forms of status more briefly treated at p. 112.
[19] *Conflict of Laws* (1935) § 149.1, p. 720.
[20] [1940] Ch. 864. It is not, of course, necessary to share the views of Scott L.J. on the universality of status in order to feel that the decision to which he would have come on the facts has much to commend it.
[1] p. 888.
[2] Lord Westbury is equally forthright in *Udny* v. *Udny* (1869) 1 Sc. and Div. App. 441, at p. 457. See also the judgment of Brett L.J. in *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, at pp. 11–12.

alternative formulae, one or other of which the fully metaphysical view seems to necessitate—[3]

(a) Each status is governed by one law which has universal effect except where a particular incident conflicts with a positive prohibition of English law based on public policy, or

(b) Each status is created by one law and is recognised universally but its incidents are effective only intraterritorially unless enforced by a positive rule of English law.

The first alternative is, in effect, that advocated by Scott L.J.; the spirit of the second is more in accord with the tendency of American law to restrict extraterritorial effectiveness,[4] and approximates to the position taken by Beale.[5]

Now it must at once be frankly stated that most of the decisions on status could be explained with some show of adequacy on either of these apparently conflicting bases. This very fact, however, suggests one important criticism, namely that the impression given by these formulae of providing a workable criterion which can be applied to concrete cases is illusory.[6] In attempting to cover all the facts they lose their practical value, whether for purposes of classification or prediction. This is particularly evident if one tries to apply either to the decisions on marriage.

A further examination of each formula, particularly the first, shows that even the measure of compatibility with the actual decisions which is achieved often requires a straining of the normal use of words. The difficulty of reconciling the decisions on infancy with any rule of universal enforcement of the domiciliary status has already been noticed, and it does not seem very fruitful to say that a guardianship created by a foreign court is of universal effect with certain exceptions, when the exceptions in fact almost completely eat up the rule.

A third major difficulty, allied to the second, is the ambiguity of the expressions "giving effect to" and "recognising" when applied to status as a whole. We have already noticed the confusion which arises because the courts are said to "recognise" the validity of a foreign marriage both when they enforce the incidents which attach to it under the foreign law and when they enforce the corresponding English incidents. In other cases, such as guardianship, the doctrine of universality drives its advocates to use

[3] *Cf.* Graveson, *Status in the Common Law* (1953), 109, which, however, is expressed to deal only with domestic status, although this restriction seems to be a retreat from the general advocacy of the same principles expressed by the learned author elsewhere.

[4] A tendency noted in Graveson, *op. cit.*, 67, and Rabel, *Conflict of Laws* (1945) Vol. I, 103.

[5] *Op. cit.*, § 120.1, p. 651.

[6] *Cf.* Schmitthoff, *Conflict of Laws* (3rd ed., 1954), 280, where the learned author emphasises the difficulty of deducing general principles of useful application from the cases.

the same word " recognition " where all that the English courts do is to acknowledge the intraterritorial effect of the foreign law. This is not in itself an improper use of the word, but it reduces the first part of formula (b) to futility as a Conflicts rule. A misunderstanding stemming from some such root is no doubt responsible for the attempt to place slavery and other forms of status unknown to our municipal law in a special " depressed " class of their own.

It seems not unfair, finally, to attribute at least in part to the limitations of these formulae the way in which writers such as Beale find themselves obliged so often to exclude from consideration a condition which is normally treated as a status.[7]

The metaphysical view in its extreme form, then, would seem not to provide an adequate basis for the interpretation and exposition of the authorities. Does the analytical view offer more hopeful prospects? If it be taken to assert merely that each static incident must be treated separately, and no attempt made to formulate general rules either as to the sum total of those incidents or as to a particular bundle of them called the status of marriage, of infancy, of guardianship, or of slavery, then it can certainly claim not to give a false sense of certainty. It also has the advantage of avoiding the difficulties which may arise on the opposite view, even in municipal law, when in one person there inhere two or more forms of status with conflicting incidents.

Most people, however, would find this approach too negative to provide the foundation for a satisfying theory of status. Treating rules as to individual incidents as the basic units from which any valid theory must be built up is, nevertheless, the first step towards a useful synthesis.[7a] The next is to lose the idea that the names " marriage," " infancy," " guardianship," " slavery " and the like represent predestined pigeon-holes into which the individual rules are bound to fit neatly. Only then can we look with open minds for the groupings into which the rules naturally fall, and state the principles which emerge.[8] No doubt some of the categories which we have rejected as taskmasters will return as useful servants,[9] but we may expect that where those categories were most at odds with the facts there will be substantial changes.

[7] *Supra*, n. 14, p. 160.

[7a] This seems to be recognised in *Re Wilby* [1956] 2 W.L.R. 262.

[8] An apt text on which to hang the whole of this study can be found in a passage from one of the last reported judgments of Lord Asquith of Bishopstone:—" Nor . . . does English jurisprudence start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with ad hoc decisions. General rules are arrived at inductively, from the collation and comparison of these decisions: the rules do not pre-exist them ": *Chapman* v. *Chapman* [1954] A.C. 429, at p. 470.

[9] Classifications which immediately present themselves, and may well prove valuable guides to thought, include those (suggested by numerous writers) into natural and artificial status, and more particularly domestic and non-domestic status. These possibilities, however, cannot be pursued in detail here.

Thus it may well be thought that the variations in the age limits applicable and in the disabilities and privileges operating make the treatment of infancy as a unitary status worthless. Instead, the rules affecting each incident will be dealt with under that department of the Law of Things on which it particularly impinges —the Law of Contracts, the Law of Succession, Criminal Law, etc.

In the case of guardianship and slavery, on the other hand, there is sufficient uniformity to make it worthwhile to formulate general rules, as has been cursorily attempted above.

Marriage is more complex. It has already been suggested that the most promising analysis is to separate three main groups of incidents—those which are enforced, those which are rejected, and those where the courts enforce not the foreign incident but the corresponding one under English municipal law. For the last group even the stoutest analyst would perhaps recognise the value of a metaphysical approach, properly applied, for the cases are inexplicable except on the assumption of an essential unity between the foreign status and the corresponding English one.

The Field Contested: (2) Strategy

This, then, is an outline of how a modified form of what we have called the analytical view can, it is submitted, be applied with profit to the study of status in the Conflict of Laws.[10] How does it compare with its rivals in the other area where theoretical differences have their outcome—namely in the influence of the theories on current decisions and future trends?

It is impossible to go into detail here, for the comparison is bound to be influenced by the subjective judgments which we make as to the relative values of different ends. In the Conflict of Laws, for example, there is a constant tension between the desire of the courts to apply the principle of comity between legal systems, and the opposing desire, fed both by convenience and national pride, ever to extend the operation of the domestic law.

Here the merit of our suggested attitude is its flexibility. An out-and-out analytical approach would provide no guidance at all for development. The metaphysical view would certainly provide clear enough guidance, if its rule of universality were taken seriously, but progress would be confined to a hardening of the outlines of the existing categories, which we have seen to be defective, and an extension of uniformity within each, which is

[10] It will be apparent that most of the results of the approach advocated here are in no way revolutionary, and what has been attempted is chiefly to make explicit what appears to be the implicit basis of the treatment of the detailed rules by the best writers, although they may leave general theory on the matter largely untouched, or even put forward theories which, taken at their face value, might seem to require different results.

likely to lead to injustice and a flight in the face of common sense.

The fact seems to be that the Conflict of Laws, one of the youngest branches of the law to receive close attention, is passing through a phase of its development which can be matched in the history of older branches. In the earliest stages of rapid expansion judges and writers are liable to make sweeping generalisations on the basis either of the few concrete cases which have arisen for decision, or of a tidy theoretical system not yet tested by the infinite variety of practice. It is a necessary step in the progress and enrichment of the law that these generalisations should be subjected to the test of detailed application in the mounting tide of actual disputes. Under this test gaps will be discovered. Broad rules may have to be broken down into ones of narrower application, and some discarded as unworkable. A certain fluidity will be found necessary for a time until increasing experience enables the raw material to be resynthesised into a form which will be able to sustain the weight and complication of a mature yet flexible system.

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LAW REFORM AND OCCUPIER'S LIABILITY

THE Third Report of the Law Reform Committee [1] is by now familiar enough in its main recommendations, and it is not proposed to attempt here an exhaustive survey or commentary upon the Report as a whole, but rather to consider three aspects of it; these are the recommendations in paragraph 79 on the duty of landlords remaining in occupation of the means of access to leased premises, the recommendation in paragraph 83 on the application of the principles of occupier's liability to movable structures, and the absence of any recommendation on whether liability is generally to be confined to structural defects.

THE LIABILITY OF THE OCCUPIER OF THE MEANS OF ACCESS

In paragraph 79 [2] the Committee, after referring to the injustices which may be caused by too rigid an adherence to the conventional categories and citing *Fairman* v. *Perpetual Investment Building Society* [3] and *Jacobs* v. *L. C. C.*[4] as illustrations of these injustices, makes the following recommendation:

> "that where the lessor of any building or part of a building remains in occupation of the means of access to the demised premises, he should owe the common duty of care to any third party lawfully using the means of access unless a more onerous duty is imposed on the lessor by the tenancy agreement."

It is difficult to understand why, in principle, this recommendation should be confined to situations where a lessor remains in occupation of the means of access to demised premises; so far as the lawful visitor is concerned his rights ought to lie against the occupier of the means of access he is lawfully using, and whether that occupier is a lessor or a vendor of the premises which the visitor intends to approach should, it is submitted, be immaterial. To take an example, let us suppose X initially leases Blackacre to Y, retaining control and occupation of the means of access; no one doubts that the right of way enjoyed by Y extends to all persons authorised by him, in fact to all his "lawful visitors," [5] and the effect of the Committee's recommendation would be, quite properly, to impose on X the uniform or common duty of care towards those

[1] Cmd. 9305, H.M.S.O., London, 1954. Presented by the Lord High Chancellor to Parliament, November 1954.
[2] And para. 95 (3) of the Summary of Recommendations.
[3] [1923] A.C. 74.
[4] [1950] A.C. 361.
[5] *Baxendale* v. *North Lambeth Liberal and Radical Club Ltd.* [1902] 2 Ch. 427, *per* Swinfen Eady J. at p. 429. This is not an "implied easement" for the visitor has no dominant tenant.

lawful visitors. In pursuance of this right of access the lawful visitors would visit Y in the sure knowledge that an injury on the way due to the lessor's breach of this duty would enable them to bring an action against the lessor. Let us suppose that subsequently X sells Blackacre to Y, granting an easement over his own land to enable Y, his successors in title and all persons lawfully authorised by him, to use precisely the same means of access. The lawful visitors will doubtless continue to use the same way, probably in ignorance of the change in the relationship of X and Y, and their remedies for injury in identical circumstances are, the Committee suggest, to be governed not by this same "common duty of care" but by the general law of easements.[6]

Whereas we should agree with this view so far as the means of access constitutes a public right of way, where the way is private different considerations arise which render the wisdom of this view questionable, and the reasons given by the Committee are not, with respect, entirely convincing or even entirely consistent with reasoning in other parts of the Report. In paragraph 34 the Committee note the absence of any duty upon the servient owner to effect such repairs as are necessary to secure the enjoyment of the easement by the dominant owner, contract and special custom apart.[7] They note further that where injury results to the dominant owner or his lawful visitors from the disrepair of the means of access they will have no remedy against the servient owner,[8] and that even when the disrepair is a breach of an express or implied obligation on the servient owner his liability on the covenant will not extend to the lawful visitors who are strangers to the covenant.[9] Nevertheless the Committee's conclusion is that this situation is not really relevant to the "occupier-lawful visitor" relationship and, if improvement of the visitor's position is to be sought then regard should be had in so doing "to the general law regarding private rights of way (which surely should not be

[6] It may be noted that in the American *Restatement*, Torts, Negligence, ss. 360, 361, are similarly couched in terms of the "lessor" retaining land which the lessee and "others lawfully upon the land" are entitled to use. There would appear to be no parallel provisions to deal with the situation where the vendor retains possession of the means of access.

[7] *Jones* v. *Pritchard* [1908] 1 Ch. 637, *per* Parker J.; *Pomfret* v. *Ricroft* (1669) 1 Saund. 322, and see Gale on *Easements*, 12th ed., p. 421. He must, of course, not create an obstruction or interfere with the exercise of the right, but this apart there is no liability to repair.

[8] The dominant owner may repair it himself or, if he prefers, guard himself by exacting a covenant to repair from the servient owner, neither course being feasible for the lawful visitor.

[9] Para. 34. Presumably if the servient or the dominant owner undertook repairs so negligently as to create a trap, or otherwise obstructed the way by an act of misfeasance rather than nonfeasance, the lawful visitor would have an action. See *Corby* v. *Hill* (1858) 4 C.B.(N.S.) 556, where a visitor to an asylum successfully sued a third party responsible for an obstruction of the drive leading thereto. *Sed quaere* whether, if the dominant owner erected an obvious obstruction, this would not amount to an implied revocation of the visitor's licence?

disturbed except in cases of a carefully circumscribed class which will not be easy of definition)." [10]

The necessity for having due regard to the law of easements and to the need for exact definition is readily conceded, but one wonders whether these *caveats* have any real substance. The essence of even the lessor's liability is, as the decisions in *Smith* v. *London & St. Katherine's Docks Co.*[11] and *Miller* v. *Hancock* [12] show, that he is in occupation and control of a means of access and therefore owes a duty towards lawful visitors whom he can reasonably anticipate will use that access. This reasoning ought not to be confined by the accidents of litigation to cases where the occupier is a lessor, and to make the visitor's rights depend on this distinction between a lessor and other occupier, a distinction devoid of any inherently logical basis, is to perpetuate an anomaly.[13] Furthermore, whether lessor or " other occupier," the lawful visitor is upon a private right of way, as the Court of Appeal recognised in *Miller* v. *Hancock*, and the law of easements is applicable in either case; if the courts in later decisions have made the lawful visitor a licensee *vis-à-vis* the lessor undeterred by the law of easements one might hope for equal courage from the Committee.

A brief examination of the remedies to which the visitor to premises who is injured on the means of access not in the occupation of the lessor is entitled brings out quite forcibly the injustice which this limited view of the Committee entails. In most cases his visit to the premises will be for purposes quite unconnected with the owner of the servient tenement, and it becomes difficult to envisage situations in which he will enter upon the way as invitee or licensee of the owner.[14] Under the general law of easements he is unlikely to succeed against either the dominant or the servient owner for injuries suffered through a failure to repair the way. So far as the servient owner is concerned it is clear he owes no duty to repair, apart from an express covenant with the dominant owner, to the dominant owner [15]; his duty towards the lawful visitor is certainly no greater. Even when the servient owner is in breach of his covenant to repair with the dominant

[10] Para. 36.

[11] (1868) L.R. 3 C.P. 326.

[12] [1893] 2 Q.B. 177, *per* Esher M.R. at p. 179 and Bowen L.J. at p. 180.

[13] Its perpetuation may be due, one suspects, in some measure to reasoning akin to that behind the test of " material interest " which the Committee propose to disregard as a basis for the distinction between invitor and licensor. Yet one would suppose that the availability of the access to visitors to the premises is just as much in the " material interest " of the vendor of premises as of the lessor.

[14] See para. 34. It cannot be supposed that the Committee intend to show that his remedies as licensee or invitee will continue, even if they do exist on the facts. If this classification is to disappear from the law as to occupier's liability it clearly ought not to remain as a means of offering a remedy to the person exercising a private right of way.

[15] *Pomfret* v. *Ricroft* (1669) 1 Saund. 322. See generally Gale, *op. cit.*, pp. 421–431.

owner, though this will afford the dominant owner a remedy for his own injuries due to this breach, it is extremely doubtful whether this avails the lawful visitor at all, for he is a stranger to the covenant. Indeed, his benefit from the easement is only real in the sense that he may use it and in so doing cannot be treated as a trespasser, but that apart he can have no action founded on the easement, for this would perpetrate the heresy of an easement in gross. The visitor's chances of success against the dominant owner are equally doubtful. That the dominant owner owes no duty to repair, apart from covenant, to the servient owner is tolerably clear; he has the right to repair so as to enable him to enjoy the benefit of his grant [16] but it would seem no duty to do so,[17] and there is no authority for suggesting his obligations towards the lawful visitors are higher. To maintain an action against the dominant owner as "occupier" is equally unlikely of success, for whether we argue that an incorporeal hereditament is by its very nature incapable of occupation or that, alternatively, the grantee of an easement cannot have such a right over land of which he is himself in possession,[18] the result is fairly certain. There would no doubt be considerable force in the argument that the dominant owner, or to a lesser extent the servient owner, owes a duty of care to his lawful visitors in negligence but, wide as the "neighbour" formula may be, the judgments in the House of Lords in *London Graving Dock* v. *Horton* [19] do not warrant any faith in the ultimate success of this argument. If, then, the lawful visitor has no remedy against the dominant owner in any event,[20] the possibility of a "circuitous" action against the servient owner by forcing the dominant owner to seek an indemnity for breach of an express or implied covenant to repair from the servient owner is equally excluded. The end result would be that the lawful visitor would, in the majority of cases, if not all cases, be without a remedy against the occupier other than the lessor; this, considering the high standard of care owed by the lessor under the Committee's recommendations, seems a poor fate and one which is quite unrelated to the substantial justice of the case.

The inconsistency of the position is brought out when one refers to the opinion of the Committee in another connection, that "it is unsatisfactory that there should be a class of persons whose rights under the general law should be capable of being limited by

[16] *Goodhart* v. *Hyett* (1883) 25 Ch.D. 182. *Hoare* v. *Metropolitan Board* (1874) L.R. 9 Q.B. 296.

[17] The dictum of Lord Mansfield in *Taylor* v. *Whitehead* (1781) 2 Doug. 949 that "he that hath the use of anything ought to repair it" might appear to apply here, but it has been said by Coleridge J. that it is not an obligation to which the grantee of a right of way is subject: *Duncan* v. *Louch* (1845) 6 Q.B. 909.

[18] *Morris* v. *Edgington* (1810) 3 Taunt. 24, Dig. 19, p. 17.

[19] [1951] A.C. p. 737 and see *post*, p. 181.

[20] Assuming he enters as a "lawful visitor" within the Committee's definition and not under a contractual provision governing the question of liability.

contractual provisions which may be entirely unknown to them." [1] This is precisely what would happen if the tenant of Blackacre with the means of access over his landlord's premises or land subsequently buys Blackacre, the vendor retaining the land over which the former tenant, now purchaser, and his lawful visitors exercise their right of way pursuant to a grant. The contract of sale between vendor and purchaser would, seemingly, entirely alter the legal rights of all those lawful visitors who may well continue to use the means of access in ignorance of the sale. A further inconsistency appears in the Committee's recommendation that the *Cavalier* v. *Pope* [2] doctrine be reversed so as to allow the lawful visitors the same right of action as the tenant when injured on the tenant's premises through a breach of the landlord's obligation to repair. This recommendation is based on a reasoning adopted from the Leasehold Committee's report, that "their presence on the premises seems to us a natural consequence of the tenancy and to constitute an essential element in the tenant's enjoyment of it." [3] It can equally well be maintained that upon the sale of premises the use of an access by visitors where the access is the subject of an easement granted to the tenant is "a natural consequence" of the sale and constitutes "an essential element in the . . . enjoyment of it." In limiting paragraph 95 (8) to cases of a lessor's liability the Committee will extend, not eradicate, the anomaly, and the rights of the lawful visitor against some other occupier are too uncertain to justify this easy relegation to the general law of easements.

Occupier's Liability and Movable Structures

In paragraph 83, the Report states the belief of the Committee that this recommendation could, subject to the existing law in the case of contracts of carriage, be made applicable to movable structures such as ships, scaffolding, ladders and lifts on the footing that the person who is in control of the structure is the "occupier" and any other person who, at the occupier's express or implied invitation or permission, goes into or upon the structure is a "visitor." This is, of course, an extension of the principles of occupier's liability which has frequently been made by the courts; as McCardie J. has said ". . . the principle is basic and

[1] Para. 55. They are here referring to the rule that where a person contracts with the occupier for the use of premises on the basis that he is entitled to permit third persons to use them, the duty owed to such third persons is governed by the terms of that contract. See *Fosbroke-Hobbes* v. *Airwork Ltd.* [1937] 1 All E.R. 108 at p. 112.

[2] [1906] A.C. 428. It must be admitted that this recommendation presupposes a breach of the landlord's obligation to the tenant to repair and an injury to the lawful visitor consequent upon that breach; the vendor-servient owner may or may not be under any such obligation to the dominant owner.

[3] Para. 258. Leasehold Committee's Final Report, Cmd. 7982, cited on page 37 of their Report.

applies alike to premises and to vehicles. It matters not whether the subject be a race-stand, a theatre or an inn; whether it be a taxi-cab, an omnibus, or a railway carriage."[4]

The question which may be put, and which it is submitted the Report does not entirely answer, is this; at what stage, and in what circumstances, are the courts to regard what is essentially a chattel as a "movable structure"? The case of a vessel, a train, and probably a motor-car cause little difficulty for the analogy with premises is close; but, if the common feature of these is the capacity for the carriage or support of persons, and indeed the Report supports this view in suggesting a person "goes into or upon it,"[5] in what category do the bicycle, the wheel-barrow or even the scooter fall—chattels *simpliciter* or movable structures? So far as scaffolding, ladders, and lifts are concerned their use is almost invariably connected with premises, and where this is so it is perfectly proper to bring them within the rules relating to premises and impose liability for the condition of these chattels on the occupier of the premises. Yet this is not inevitable, and it is quite possible for a ladder, for example, to be lent for a purpose quite unconnected with the owner's own premises, so that we should require to know whether, by that fact, the ladder ceases to be within the category of movable structures and reverts to the category of chattels *simpliciter*.

The question of categorisation, or definition, is not one of purely academic interest. Where the chattel is being used for the purpose of carriage, as in the case of the motor-car, ship or train, the importance of the distinction will not be great, for the standard of care owed at common law by the carrier to his gratuitous passenger would seem to be one of exercising due and reasonable care,[6] a not dissimilar standard from that which the Committee recommend imposing on the occupier of premises towards lawful visitors. Whether the duty is owed in relation to the actual condition of the vehicle,[7] as well as to the manner in which the

[4] *Maclenan* v. *Segar* [1917] 2 K.B. 525.

[5] Para. 83.

[6] The decision in *Moffatt* v. *Bateman* (1869) L.R. 3 P.C. 115, attributing liability only upon proof of gross negligence, which gave substance to the view that a person lending a carriage to a friend was under no duty to ascertain its safe condition (see Salmond, *Torts*, 9th ed., p. 545; this view is altered in the 10th ed. at p. 485). has not been followed, and in general the view now taken by the courts is that the driver owes a duty of reasonable care to the gratuitous passenger. See generally Paton, *Bailment in the Common Law*, Chap. 8. and see *White* v. *Steadman* [1913] 3 K.B. 340. *Elliott* v. *Hall* (1885) 15 Q.B.D. 315. It is uncertain whether the standard varies according to whether the carriage is of persons or goods: Paton, *op. cit.*, p. 144. Perhaps not so high as the duty to "see that the premises are reasonably safe" and probably also different in respect of liability for the acts of independent contractors. See *Harris* v. *Perry* [1903] 2 K.B. 219 *per* Collins M.R. for the view that the duty to the bare licensee is greater where carriage is provided than where the licensee merely permits the licensee to pass through premises. This would suggest that the duty approximates more closely to the higher "common duty" recommended by the Committee.

[7] Compare Hilbery J. in *Haseldine* v. *Daw* [1941] 1 All E.R. 525 at p. 533.

vehicle is driven [8] is not entirely clear, but if the analogy with premises is really the correct one, as the Report suggests, then there should be no doubt that the duty does extend to the condition of the vehicle. The real difficulty and importance of definition will arise where the chattel is not used for the carriage of persons but is one intended for use by persons, as in the case of a wheelbarrow, ladder or lawn-mower. Initially these would to be treated as chattels *simpliciter*, and the duty of the lender or gratuitous bailor is, on the authorities, merely one of communicating defects of which the lender or bailor knows, and he is only liable to the borrower or gratuitous bailee where he wilfully, or by gross negligence, fails to discharge that duty.[9]

Unless, therefore, these movable structures are defined in such a way that there are clear criteria for distinguishing them from chattels *simpliciter*, the result may well be to impose a dilemma on the courts as to the duty they should apply in any given case. It can scarcely be supposed that the Committee would contemplate an exhaustive list of such movables, so that some criteria must be sought. It may be that these movable structures are either those used for the carriage of persons or those not so used but used in connection with premises in the occupation of the person on whom liability in respect of such movable structures is sought to be imposed. This would include the ladder which the occupier of premises lends to a jobbing gardener at work in his garden, but not the ladder which he lends to his next-door neighbour for use in the latter's garden for his own purposes. On the other hand it may be that these movable structures are chattels which may be occupied in the sense that a person may come upon or enter into the chattel as a means of carriage or support. The concept of "occupation" does, however, seem unreal in relation to chattels and, moreover, it is a concept apt to define the basis of liability rather than the nature of the chattels in respect of which these rules should apply. Even supposing criteria for defining these chattels can be found, there remains the question of defining

[8] See *Haseldine* v. *Daw* [1941] 2 K.B. 343, *per* Goddard L.J. at p. 373, a dictum which seems to suggest that the duty relates only to the driving and not to the condition of the vehicle.

[9] *Coughlin* v. *Gillison* [1899] 1 Q.B. 145. *Gautret* v. *Egerton* (1867) L.R. 2 C.P., *per* Willes J. at p. 371, *obiter*: "There must be something like fraud on the part of the giver before he can be made answerable." This was the standard actually applied in *McCarthy* v. *Younge* (1861) 6 H. & N. 329, where the plaintiff used scaffolding, gratuitously, which had been erected by the defendant for the purpose of removing a party wall. But see the later case of *Heaven* v. *Pender* (1883) 11 Q.B.D. 503 where the analogy with premises is made and the "occupier" of defective staging was held to be under a duty to exercise reasonable care. N. S. Marsh (1950) 66 L.Q.R. 39 suggests the duty is higher since *Donoghue* v. *Stevenson* [1932] A.C. 562, and is possibly based on a misunderstanding of *Coughlin* v. *Gillison*. Paton's own conclusion is that the traditional duty, as stated above, remains "until the House of Lords has otherwise decided": *op. cit.*, p. 153. The American *Restatement*, Torts, ss. 388, 405 adopts a wider test based on knowledge, actual or constructive, of the defect.

the basis of liability in respect of their defects; the Committee suggest this basis is "control," although the immediate analogy with occupation is, one would have thought, "possession." The American *Restatement* imposes liability on the "supplier" of chattels, defined as "any person who . . . gives possession . . . or permits another to use or occupy it whilst it is in his own possession or control." [10] Perhaps this somewhat wider test of "possession or control" may be preferable to "control" *simpliciter*, for it would extend liability to the gratuitous bailor, to the person who gratuitously lends his chattel to another for that other's own purposes, and also afford a test for assessing liability to persons other than the immediate transferee. Of course the "casual delegation" cases do favour control as the test of liability,[11] but the analogy is far from exact where the situation is not one of vicarious liability but of a direct breach of the person's own duty in respect of the condition of the chattel towards lawful users of it, whether the immediate transferees or not.

As against this it may be argued that both the concept of possession and that of control are ambiguous, for they may refer to a notion either "physical" or "legal," but that it were better to avoid an entanglement with the intricacies of the concept of possession [12] and adhere to the single test of control which is much more a question of fact than that of possession. Certainly unless the term possession were to be understood as meaning *de facto* possession, it would by no means be synonymous with control, and it is clear that legal possession can change where the control or custody of the chattel remains constant. Where B uses A's car for his own purposes, or takes the car under a gratuitous loan which involves no loss of possession by A, legal possession and control may separate, and one hesitates to suggest that an action by the injured lawful visitor C should lie exclusively against either A, the person in possession, or B, the person in control. Strictly,

[10] Torts, Negligence, s. 388.

[11] *Parker* v. *Miller* (1926) 42 T.L.R. 408. See also *Hewitt* v. *Bonvin* [1940] 1 K.B. 188. *Britt* v. *Galmoye* (1928) 44 T.L.R. 294 seems a case where control and possession are separate. The use for the purposes of the owner seems to be the test of his control: *Ormerod* v. *Crossville Motor Services* [1953] 2 All E.R. 753; [1953] 1 W.L.R. 1120, *per* Denning L.J. at p. 1122. But see *Chowdhary* v. *Gillot* [1947] 2 All E.R. 541 where the use was such but the defendant owner was held to have neither possession nor control. See generally Brooke-Smith, "Liability for the Acts of Another . . . Servant or Agent?" (1954) 70 L.Q.R. 253.

[12] For the different "elements" in the concept of possession see Pollock and Wright, *Possession in the Common Law*, pp. 26, 27. Paton, *op. cit.*, p. 16. There is some support for the view that even in bailment, where the bailor can at any time demand the return of the object bailed he still has possession: *Ancona* v. *Rogers* (1876) 1 Ex.D. 285, *per* Mellish L.J. at p. 292, approved by Lord Porter in *U.S.A.* v. *Dollfus Mieg et Compagnie S. A. and Bank of England* [1952] A.C. 582 at p. 611; also Evershed M.R. [1950] Ch. 333 at pp. 344–345. Paton, *op. cit.*, p. 17, regards it as possible for possession to remain in the gratuitous bailor but questions whether this transaction or that of a bailment at will are properly treated as bailments.

one supposes, B must be the "licensor," and the analogy with premises would suggest liability on him; but where A has parted with control for a single evening to B, it seems wrong to give A immunity from an action by C which arises from the unsafe condition of the vehicle.

In any event this liability would be subject to any question as to the "status" of the passenger or lawful visitor; so far we have assumed no question arose as to his "lawful" relation *vis-à-vis* the person against whom the visitor seeks to enforce a liability. It may be, however, that whatever his position *vis-à-vis* the driver of a car, or the person in physical possession of a chattel, his position *vis-à-vis* the person in control or legal possession may be quite unlawful. Where the visitor or user of the chattel, including the immediate transferee, makes a use of the chattel entirely inconsistent with the terms of the loan or bailment at will, or where the visitor or user faces a prohibition against his entry or use of the chattel by the person in control or legal possession, it will be open to such person to contend he is a trespasser and liability towards him will be adjusted accordingly.[13]

The Kind of Defects for which Liability is to be Imposed

The final problem on which one could wish for some guidance or opinion from the Committee and which, in the present state of the authorities, remains uncertain enough to merit express treatment, is whether the liability of the occupier relates only to structural defects, that is to say defects in the physical condition of the premises, or whether it extends to all foreseeable dangers to the person or property of the lawful visitor. In *Cox* v. *Coulson*, Bankes L.J. stated "It seems to me obvious that the duty . . . is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on . . ."[14] This reasoning has been extended to places where the premises

[13] This would leave a court open to take the line of reasoning used in the C.A. in *Twine* v. *Bean's Express*, 175 L.T. 131. See a critical discussion of this reasoning in its relevance to employer's liability by Newark (1954) 17 M.L.R. p. 102. The American *Restatement*, Torts, Negligence, advocates precisely the same result in the Comment on s. 388 (e) Ambit of Liability. "Except possibly . . . the one who supplies a chattel for another's use is not subject for liability for bodily harm caused by its use by a third person without the consent of him for whose use it is supplied. This is so although the chattel is of a sort notoriously likely to be so used. So, too, the supplier is not subject to liability for bodily harm caused by its use by a third person who uses it even by the consent of him for whom it is supplied, if the supplier has no reason to expect that the third person will be permitted to use it."

[14] [1916] 2 K.B. 177 at p. 191, and see Lord Wright in *Glasgow Corp.* v. *Muir* [1943] A.C. 448 at p. 462.

were used as a motor-racing circuit,[15] an ice-hockey rink,[16] or a golf course [17] and may on the facts be convincing enough. It is difficult, however, to resist posing the question why the duty of the occupier should not extend to guarding the lawful visitor against dangers which are not structural in any proper sense but arise from the intentional or negligent acts of persons upon the premises of whom (and of whose actions) the occupier knows or ought to know.

It has been suggested that the duty of the occupier of premises is in effect a particular level or standard of the more general duty in Negligence, a " subhead of the general doctrine of negligence." [18] If this is so there seems no logical reason to limit liability to structural defects, and even if not, there is no reason why the liability of the occupier should be so limited where treated as a distinct category in the law of Tort. If the liability extends to cover the bite of a watch-dog,[19] or the bites of verminous insects,[20] both cases of " structural defects " only by considerable distortion of language, it ought to extend to the acts or omissions of persons who cause injury to the lawful visitor which could be foreseen by the occupier. Let us suppose that the visitor to a large store is injured on an escalator by the tomfoolery of children using the escalator as a playground; provided the occupiers of the store ought to foresee the acts of these children as likely to cause injury to lawful visitors to the store, is there any real reason why liability should not exist in the same way as if the lawful visitor had tripped over a defective step on the escalator? In the recent case of *Pearson* v. *Lambeth B. C.*[1] a licensee to a public convenience was injured by striking his head on a grille which had been pulled from a recess so as partially to block the headway over the exit by mischievous children who had, to the knowledge of the defendants, played and tampered with this grille for a long period of time. The defendants, the licensors, were held liable; they knew that there was a physical object capable of being put into a dangerous condition by the acts of third persons whom the defendants should have foreseen as likely to act in this way, and therefore the defendants had " constructive knowledge " of the

15 *Hall* v. *Brooklands* [1933] 1 K.B. 205.
16 *Murray* v. *Harringay Arena* [1951] 2 K.B. 529.
17 *Potter* v. *Carlisle and Cliftonville Golf Club* [1939] N.I. 114.
18 *Per* Lord Wright [1943] A.C. at p. 461. But see *London Graving Dock* v. *Horton* [1951] A.C., *per* Lord Normand, at p. 757, where the *Donoghue* v. *Stevenson* principle was ruled out as inapplicable and apparently viewed as an entirely separate principle; also *per* Lord MacDermott at pp. 765–766 who clearly views the two principles as distinct and seems to exclude the negligence principle from any application in these cases; also *per* Lord Reid at p. 778 who suggests that the negligence principle is limited to cases where the defendant parts " with control of a dangerous object," a quite different situation from where the defendant is occupier of premises.
19 *Kavanagh* v. *Stokes* [1942] I.R. 596.
20 *Silverman* v. *Imperial London Hotels* (1927) 43 T.L.R. 260.
1 [1950] 2 K.B. 353. See also *Coates* v. *Rawtenstall Corp.*, 157 L.T. 415.

danger. With respect it is suggested that the real danger which the defendants ought to have foreseen lay in the actions of these mischievous children on their premises and, if this were recognised, there should be no need to elaborate on notions of constructive knowledge. Supposing the children in swinging from the grille had not moved the grille but caught the lawful visitor on the head with their boots; would this change in the facts really warrant the complete change of legal principle applicable to the case? Our own conclusion is that it were better to base the occupier's liability more broadly than the courts at present seem prepared to do, and impose liability for all dangers on his premises which he ought reasonably to foresee.

This is not to say that the occupier will be liable for all the acts of third persons which he might possibly anticipate, and it is not suggested, for example, that an occupier ought to be liable for the felonious acts of third persons unless they are so often committed on his premises, or are so obviously being committed on his premises that a duty arises towards the lawful visitor. In *Tinsley* v. *Dudley* [2] the plaintiff, a customer at a public-house, sought to recover from the landlord the value of a motor-cycle which the plaintiff had left in a covered yard on the premises marked "garage," and which had been stolen. The case was argued on the basis of the occupier's duty towards his invitee, and the plaintiff failed to recover. Jenkins L.J. stated "There is no warrant . . . for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party." [3] This same decision could well have been reached on the argument that the felonious acts of unknown strangers, of whose existence on his premises the occupier could not reasonably be aware, were not foreseeable dangers which the occupier could reasonably foresee will cause damage to his lawful visitors. Yet if the vehicles disappeared from the garage week after week, and the occupier took no steps to prevent the thefts or warn visitors, one would suggest that he had failed in his duty towards such visitors.

The dictum of Jenkins L.J. cited above would suggest that where the invitation extends to the goods of the lawful visitor there may well be a duty to the visitor in relation to that property. It is, however, by no means certain that the courts are prepared to

[2] [1951] 2 K.B. 18. The somewhat analogous case of *De Yong* v. *Shenburn* [1946] K.B. 227 was not argued on the basis of the occupier's liability to his invitee or licensee.

[3] [1951] 2 K.B. at p. 31. There may, of course, be an express or even implied contractual duty to keep a visitor's goods safe. See *Scarborough* v. *Cosgrove* [1950] 2 K.B. 805 (C.A.).

extend the duty of the occupier to the protection of the property of the visitor from foreseeable damage, and again one could wish for some specific treatment of this problem by the Committee. The authorities suggest that liability is restricted to damage which is personal "or at most material injury which is incidental or ancillary to personal injury"[4]; this is the view which the American *Restatement* also takes in stating the principles of liability for "bodily harm." It is worthwhile questioning a principle which makes so firm a distinction between a lawful visitor's personal and proprietary interests. Where the lawful visitor wears his overcoat and is showered with paint, it would seem he can recover for his personal injuries and these "ancillary" damages to his property; on the other hand if he more politely leaves his overcoat in the cloakroom, and there during his absence it suffers a similar fate, he would not seem to be able to recover this damage under the principles of occupier's liability. Why, one may ask, does not the duty of care owed by the occupier extend to the protection of any lawful interest of the visitor which he can foresee will be endangered on his premises? In effect, though the courts are unlikely to accept this analysis,[5] the decisions suggest that the occupier's duty lies only in respect of the interest of the lawful visitor in his personal safety; this is only satisfactory where this is the only interest which the occupier can reasonably foresee as likely to be endangered on his premises, and it is otherwise illogical.[6] Moreover, as will readily be appreciated, this question relates not to remoteness of damage, but to whether in the first case any duty is owed to the visitor to protect his property from harm.

To couple both these problems in a single example, it is submitted that where the occupier of a store allows that store to become a hive of pickpockets, remaining negligently indifferent to their activities, he ought to be liable for the pecuniary loss of his lawful visitors resulting from the acts of these third persons on the same basis as he would be liable for bodily injury caused by a trap on his stairway. To allow the occupier tartly to retort

[4] [1951] 2 K.B., *per* Evershed M.R., at p. 25.

[5] There is some recognition of a theory of interests by Lord Wright in his article "Re Polemis" (1951) 14 M.L.R. 393. And see E. Anthony Machin (1954) 17 M.L.R. 405. Also American *Restatement*, Torts, s. 281, Comment (g).

[6] If the rules relating to occupier's liability are a part of the law of negligence there is a further hazard to a claim of this nature in the *obiter dicta* of Asquith L.J. in *Candler* v. *Crane Christmas* [1951] 2 K.B. 164 at p. 189, which suggest that an action in negligence will not lie when the damage is not physical in its incidence to person or property (following Wrottesley J. in *Old Gate Estates* v. *Toplis*, 161 L.T. 227). But apparently this hazard disappears when there is a contract between plaintiff and defendant: the plaintiff may then sue in negligence for damage which is pecuniary and caused by the negligent misstatement of the defendant. See *Parsons and Way* v. *Waller* [1952] C.P.L. 417. This seems almost a modern revival of the long discredited view that negligence will not lie except upon proof of contract.

that the dangers are not "structural" or that the harm is not "personal" smacks of rank injustice.

In conclusion a single observation seems appropriate; the opportunity for comprehensive law reform comes all too rarely, and the desire that it should be as comprehensive as possible, resolving as many anomalies as possible, is one which is shared by many. The main aims of the Committee's Report are not subject to criticism here, and such criticism as is offered is more by way of inquiry as to whether these aims may not be broadened so as to make any subsequent legislation more comprehensive and less productive of anomalies.

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CORRESPONDENCE

The General Editor, *The Modern Law Review.*

4th January 1956.

Sir,

I should be grateful for the opportunity to reply briefly to Professor Gower's comments on my article on *Houldsworth* v. *City of Glasgow Bank.* May I begin by saying that in the last sentence of my article I rather overstated my case when I said that the House of Lords were fully conscious of the company's separate legal personality; I should have said that Lords Cairns and Selborne were fully conscious of this.

Professor Gower is quite correct when he says that, if my method of calculating the damages is applied to his hypothetical case, B, C and D would be no worse off if A were allowed to claim damages without rescinding than if he first rescinds and then claims damages. Professor Gower is, however, under a misapprehension as to my argument. I did not say that the decision in *Houldsworth's* case was intended to protect the shareholders from being placed in a worse position than if Houldsworth had rescinded and then claimed damages, but that it was to protect them from a claim by Houldsworth that was inconsistent with his contract with his fellow shareholders. Taking the example given by Professor Gower when A, B, C and D subscribe for their shares they contract with each other that the net assets shall be shared equally between them. The consequence of A's claim for damages for the fraud inducing his subscription would be to give A £2,500 of the £8,000 and the other three £1,833⅓ each. If the contract is still subsisting when A makes his claim for damages, B, C and D can justifiably set up the defence that, although A agreed that he should only be entitled to one quarter, he is now saying that not merely at the very moment that they entered into this contract with him but by their very act in so doing they incurred a liability towards him, which sets at nought this agreement; to award A damages would be to allow him to break his agreement with them, and this the House of Lords would not sanction. Obviously, if A claims rescission as well as damages, this defence is not open to B, C and D for the contract no longer exists as far as A is concerned; in this case, therefore, A is able to obtain damages. I feel, therefore, that Professor Gower, whilst rebutting an argument which I did not advance, has failed to demonstrate the falsity of my explanation of the case. I also feel that Professor Gower has failed to answer the argument in the penultimate paragraph of my article.

Professor Gower is, of course, entitled to his opinion that my explanation is unsatisfactory, though I may be pardoned for thinking, for the reasons indicated above, that he has not demolished my arguments at all. When, however, in the closing sentences of his Reply, he seeks to defend his own explanation of the case, I feel that he is putting himself into an impossible position. Whereas I regard the decision in *Houldsworth's* case as fully justified, he has made it clear from the very start that he regards it as unsatisfactory, and once again in his Reply he stigmatizes the practical results of the case (under either explanation) as "absurd." If he is convinced that his explanation is a sound one, then surely he must acknowledge that the decision itself is justified. He cannot "have it both ways."

Yours faithfully,

J. A. Hornby.

LEGISLATION

The Copyright Bill

The Copyright Bill has passed through its various stages in the House of Lords, but this note cannot be anything more than tentative observations about a measure which beyond doubt will undergo material alteration on matters of cardinal importance in its remaining stages in the Lords and in its passage through the Commons. Much of what is mentioned here may, even before its publication, be of purely archaelogical interest, but there are circumstances relating to the introduction of the Bill and its present features which justify comment at this genitive stage, since there is much hard work which needs to be done if the Bill is even remotely to justify the high aspirations of its sponsors.

The Bill had its second reading in the Lords on November 15, 1955, and was introduced by the Lord Chancellor in a relatively brief speech which of necessity omitted reference to a great number of the novelties introduced by the Bill and a few of its revolutionary features. In his concluding peroration, however, Lord Kilmuir, normally an impassive and unemotional man, rose to unwonted eloquence when he said of the Bill—

> "It is important to authors and composers of music, and to innumerable other people to whom we owe immense pleasure in our lives. It is also important that a world which concentrates of necessity so greatly on the destructive aspects of modern thought and invention should turn occasionally to the side of intellectual achievement and the requirement to help those who contribute to the advance of the spiritual side of man."

These observations could fairly be calculated to raise high hopes in the breasts of authors and other creative workers. From Grub-street to the Athenaeum, there should have been a rubbing of hands in high glee—plainly there were good things to come. Alas, when the details of the Bill were unveiled, the terms in which it had been introduced by the Lord Chancellor looked very odd. I have read the Bill with care and it is not I think an exaggeration to say that on every single topic of consequence where the Bill introduces change in the existing law, it is a change adverse to the interests of the author, artist or the composer. This is not to say that some of the changes may not be desirable and expedient from a broader aspect than a sectional concern, but it is humbug to assert that the measure is in any sense a charter for the creative artist or was brought into existence from any wish to serve those interests.

These harsh observations do not lose sight of the fact that the introduction of the Bill will enable the two recent international Copyright Conventions, namely the Berne-Brussels Convention and the Universal Copyright Convention, to be ratified, with the most important consequence that, for the first time, copyright for British books is secured in the United States without compliance with any extra-territorial requirements—such as registration at Washington within any prescribed period. Under the Universal Copyright Convention, once it is ratified, all that will be necessary is for a symbol consisting of the letter " C " in a circle together with the name of the copyright proprietor and the year of the first publication to be inserted in any book published in a Convention country and the requisite protection is secured.

The advantages of adherence to the Conventions are real and important and bring to a final end an ugly chapter in international dealings at the expense of a group hitherto too defenceless to guard their interests. It is however the case that the benefits of both Conventions could have been secured without introducing any of the less desirable changes in the present Bill and certainly, since the Berne Convention is solely directed towards enhancing the rights and protection of authors, without affecting their position in the slightest. That the Government emphatically believes the contrary I do not however dispute.

It is unnecessary to penetrate deep into the Bill to justify my strictures about its disregard of the interests of writers. It can be opened at random almost anywhere, and a choice illustration stares from the page. It is impossible within the scope of this note to seek to catalogue exhaustively all the instances, but some important ones furnish powerful examples:—

In section 4 (2) (*b*) of the Bill (H.L. as amended in Committee) a literary or dramatic work commissioned by a newspaper or magazine now has its entire copyright, in the absence of agreement to the contrary, transferred away from the author subject to a most unsatisfactory qualification introduced in subsection (3) of the same section, whereby the newspaper is deemed to have covenanted with the author not to use or publish the work except in a newspaper or magazine. This qualification does not prevent the widespread syndication of the work without the payment of any extra fee. Furthermore, unless agreement can be reached between the copyright owner and the author, it will create a legal position in which all rights in the literary production can be completely petrified for an indefinite period. A similar provision was contained in the 1911 Act (section 5 (1) (*b*)) but operated only where the journalist concerned was in the employment of the newspaper or journal.

For the ostensible (but unconvincing) reason that it is a mandatory pre-condition of ratifying the Brussels Convention,

there have been swept away into the limbo three sensible provisions now contained in the 1911 Act. Moreover, their repeal is actuated by a belief on the part of the representatives of the Berne Union at Brussels that the existence of these provisions constituted an encroachment on the absolute rights of authors, whereas in fact they constitute very real and valuable safeguards. The first two provisions are sections 3 and 5 (2) of the 1911 Act whereunder—notwithstanding that the term of copyright is for the life of the author and a period of fifty years after death—any publisher may publish a work after the expiration of twenty-five years from the death of the author, provided he gives the requisite notice and pays the appropriate royalty of ten per cent. in accordance with Board of Trade regulations. Moreover, as a complementary provision, an assignment by an author who is the first owner of the copyright cannot operate to vest in the assignee any rights beyond the expiration of twenty-five years. These provisions have a dual operation; the first and undoubtedly the lesser, that howsoever improvident the bargain which an author may have struck, he cannot put it out of his power to prevent some ultimate benefit coming to his estate at the tail-end of the copyright period if the work has achieved sufficient success. More important, however, it becomes impossible for a publisher to retain sole and monopoly rights in a book which may by then have veered towards becoming or have even become a classic. The public is at present assured that within a measurable period of the author's death there is nothing to prevent the publication of a cheap edition in healthy competition between publishers. The abolition of these rights is unfortunate, particularly since the last possibility of defeating a monopoly protection, for what by any standard is a term of indecent length, is also intended to disappear with the repeal of section 4 of the Copyright Act, 1911. This section enabled an application to be made to the Judicial Committee of the Privy Council at any time after the death of the author or composer to allow the republication of the work if it was alleged that the copyright owner was withholding the work from the public in a fashion injurious to the public interest. Resort had never been made to the section —doubtless because of the unsuitably portentous tribunal—but it served a moral purpose and, with its authority vested in some less august body, could usefully have remained alive. It is not possible in the short space available to discuss the evidence which (quite apart from Convention considerations) satisfied the Copyright Committee—whose recommendation is accepted by the Bill—that the protection of these sections had ceased to be necessary, but I hope that a fuller review of the matter may be possible in some later issue. It will suffice to say for the present that careful and informed representations to the Convention countries indicating the beneficent nature of these provisions and the fact that when

analysed they enure to the benefit rather than to the detriment of authors, ought to have secured their preservation within the framework of the Treaty. Moreover, it would have required only a minor amendment to all three sections, whereby they could be brought into effect only with the consent of the author's personal representatives, to have brought them within the letter and the spirit of the Brussels Convention.

It is paradoxical to find these sections booted out so unceremoniously because of the scrupulous and commendable concern of the Government with strict adherence to their Convention obligations, and to seek to reconcile this attitude with some of the later provisions which appear in the Bill. To take by way of example two instances only: Although I am not equipped to construe a Treaty Document, I would submit that the wording of Articles 11 and 13 of the Brussels Convention furnish very tenuous justification for the incorporation into the Bill of the elaborate machinery contained in Part IV (to which I refer in greater detail below) whereby a Performing Right Tribunal is established and clothed with powers for the grant of compulsory licences. It is even more difficult to see how the Convention obligations can easily be squared with, say, subsection (7) of section 6 of the Bill which has been unobtrusively slipped in and contains an astonishing deviation from the normal principles of free contract. Under this section when anyone licenses a radio or television organisation to broadcast "live" a literary dramatic or musical work in circumstances where the licence gives no right to film it, the licensee corporation is now permitted, without any further consent from the copyright owner or any consultation on the methods used, to pre-film the work concerned. It is true that the film may be used only for the purpose of the original broadcast and must be destroyed within a period of twenty-eight days after it is made, but why it should be necessary to protect great organisations against their own improvidence in omitting to obtain any necessary rights or to bestow upon them rights which the author may well and reasonably not want them to have (since quite different production techniques are involved) passes credence, though it may perhaps be explained during the passage of the Bill.

It is perhaps unfair to suggest that the matters that I regard as objectionable in the Bill will necessarily survive, since it makes its passage through the Lords and to the Commons canopied with a wealth of promises and half promises of changes both in principle and in drafting. The Government have so far displayed a reasonably accommodating attitude, and the major criticism of their conduct of the Bill on its way through the Lords is the total bankruptcy by the Government spokesman of any consistent principle to explain and determine the decision reached on many vital matters. The Bill has been shepherded through the House by a spokesman who despite brave efforts has been plainly ill at

ease with a highly technical subject, and time and time again amendments have been accepted from the floor or promised consideration, which brought about, or were designed to bring about, legislation differing sharply from the draftsman's original intention.

A good instance of this confusion is to be found in the evergreen controversy with regard to the rights of gramophone recording companies. Although in a distinctly improved form as to drafting and general operation, section 8 of the present Bill re-enacts the provisions of section 19 of the 1911 Act. By section 19, to the profound and reasonable astonishment of everyone who comes fresh to the subject of copyright law, a composer is put into the fantastic position that, if he has once licensed any work for recording by a British gramophone company, it may thereafter be recorded by all and sundry without any further consent from the composer and upon payment of a percentage on the sale price. The justification for this provision may have emerged in the debate in 1911 but remains a matter of profound obscurity at the present day, and little light is thrown on the subject by a supposed explanatory paragraph (paragraph 80) of the Report of the Copyright Committee which in the following paragraph recommended that as this anomaly had been the law for the last forty years it would be a pity to change it now. This pitiful attitude towards its responsibilities by the Committee is now reflected in the Copyright Bill, but the Government is plainly halfhearted on the matter and has now responded to a vigorous challenge with a promise or semi-promise that a drafting change will be introduced into the section to deal with the case of a work of serious music so as to ensure that proper standards of orchestral performance and acoustics are maintained. It is difficult to understand why a light musician, who might nevertheless set store by the quality of the recording, should not receive similar protection and one does not envy the task of the Parliamentary draftsman who is to implement this particular promise.

A further grave confusion of policy arose in connection with the performing right in a gramophone record. It is common knowledge that the Act of 1911 was intended to furnish copyright protection in a gramophone record so as to prevent the record from being pirated by another company, but it was never intended that a performing right should be bestowed upon the gramophone companies so as to enable them to collect a fee, independently of the rights of any composers or musicians, in every instance when a gramophone record was played in public. In the year 1933, however, twenty-two years after the passing of the Act, in the now famous case of *Gramophone Company Ltd.* v. *Carwardine & Co.* [1934] 1 Ch. 450, a gramophone company successfully established that the rights bestowed under section 19 (1) of the 1911 Act included a performing right, and not merely a right to prevent copying. In the next year a collecting society called

Phonographic Performance Ltd. was established to perform a role similar to that performed by the Performing Right Society for composers, and to collect the fees on behalf of the gramophone companies. It is generally agreed that the gramophone companies exploited to the full their providential success in the courts but nevertheless the Bill as originally presented contained no provision whatever for mitigating any hardships. However, following a strong assault, the Government have now agreed to amend the offending section by accepting the spirit of a very mild and innocuous amendment proposed by Lord Lucas whereby fees shall not be recoverable where the record is performed for the purpose of social amenities or otherwise than for profit. Again, it will be interesting to see what emerges on the redrafting, and in any event the gramophone companies are left pretty well in full possession of their unexpected windfall.

It should be emphasised that although authors, etc., may cavil at the Bill, it was clearly designed as a Christmas gift for several other classes of the community. Publishers of course enjoy by way of a side wind the benefit of the repeal of the provisos to sections 3 and 5 of the Copyright Act to which I have referred above and indeed enjoy many other indirect little titbits throughout the Bill. For instance, the problem raised in the case of *Jonathan Cape Ltd.* v. *Consolidated Press Ltd.* [1954] 1 W.L.R. 1313, whether an exclusive licence to publish constitutes a sufficient assignment of copyright to justify a publisher in instituting proceedings without joining the copyright owner—an age-old matter of difficulty and interpretation—has now been resolved by section 33 (5) of the Bill. Here once again the unfortunate author finds his legal intentions turned topsy turvy and "any agreement in writing, signed by or on behalf of the owner of any copyright, whereby the owner purports to confer on another person an exclusive licence in respect of the copyright" is now construed as a partial assignment of the copyright to that person. This is indeed convenient for publishers but may well be open to objection on the part of authors who may desire to regulate the circumstances in which proceedings are taken in respect of their works. In addition, it is by no means easy to understand the effect of this section where for any reason a licence has to be implied and the owner cannot be said "to purport to confer." Time will no doubt tell. Similarly, minor prizes are bestowed on the B.B.C. and the I.T.A. and the programme contractors under the I.T.A. A new right is created, as originally intended by the ill-fated Copyright and Television Exhibiting Right Bill, to protect both sound and television broadcasts against the presentation in public of television programmes, other than as regulated by the owners of the programme, against re-broadcasting by a competitor, and against recording for commercial purposes. There is room for controversy here as to the appropriate recipient of this new

right. The principal intention of the section is to deal with the question of public sporting events, but both the Copyright Committee and the Government have decided that the rights should be vested in the B.B.C. or the I.T.A. and not in the sporting promoters. The explanation of this decision was the reasonable one that otherwise "there would grow up round the public performances of television a thick hedge of licences which would be required from many associations of copyright owners (as well as from individuals) . . ."

The film industry, too, is not neglected by the Bill. Section 13 contains a disarmingly simple provision creating for the first time a separate copyright in cinematograph films. The industry was not, however, at the outset very pleased with its Christmas gift since the duration of the copyright was first fixed at twenty-five years. However, possibly unlike the authors, it can marshal powerful voices and in no time at all an amendment had been accepted extending the term to fifty years. In that connection it is of some interest to observe the arguments which persuaded the Copyright Committee to recommend a term of twenty-five years, which were briefly that no manufactured product enjoyed a term of protection of copyright length, and that a film was to be regarded as equivalent to a manufactured product. Shades of Chaplin; shades of Clair!

I have already referred above to the establishment of the Performing Right Tribunal which is invested with the function of determining "disputes arising between licensing bodies and persons requiring licences, or organisations claiming to be representative of such persons." The provisions are set out in several lengthy sections of the Bill, and since it is reasonable to expect that there will be drastic amendments, at least in the drafting, no particularly useful purpose would be served by detailed comment. The object of these provisions is salutary, since the licence-issuing bodies, such as the Performing Right Society—controlling as they do virtually all copyright music—could, if so minded, exercise a complete dictatorship in these fields. It is fair to the Performing Right Society at least to say that the discharge of its complicated and important duties has met with little or no criticism and with much commendation, but this is by no means true of the other collecting societies, and some curb on these powers is now needed having regard to the enormously increasing field of mechanisation in music.

Lastly there is a quaint little benefit conferred on the tortfeasor. Section 18 (3) (*b*) now provides that the plaintiff shall not be entitled to any damages or an account of profits if, "where the articles converted or detained were infringing copies, the defendant believed, and had reasonable grounds for believing, that they were not infringing copies." This provision makes more important alterations to the remedies available than at first sight would

appear to be the case. Under the present law, to obtain protection a defendant needs to prove that he is unaware that copyright exists in the work—manifestly a matter of the greatest difficulty. There is, however, a very wide distinction between ignorance that a copyright exists and ignorance that the copies being sold are an infringement. This is a provision which should be reviewed with very great care by the Commons, since although the onus of proof is upon the defendant there have been very many cases where damages have legitimately been awarded in the past which will now come under the umbrella of this section.

This note covers some of the major provisions of an important piece of social legislation. The note has an admitted and palpable bias in favour of the writer and artist whose interests have not been well served by the Bill. It is to be hoped that a vigorous corrective will be administered in the Commons, and that when the Bill is ultimately enacted it will come at least within reach of the Lord Chancellor's oratorical flight.

A. Goodman.

NOTES OF CASES

The Need to Direct on Burden of Proof

The traditional direction to the jury in criminal trials—"The prosecution must satisfy you beyond reasonable doubt"—had this to commend it: in a few words, the jury were told (a) where lay the burden of proof ("The prosecution must satisfy you") and (b) that the burden was a heavy one ("beyond reasonable doubt"). In the case of *Summers*,[1] Lord Goddard C.J. deprecated the use of the "reasonable doubt" formula and suggested instead that juries be told to convict only if the evidence "satisfies them so that they can feel sure" or simply that they must "be satisfied." So far as the first of these two suggestions is concerned, there is little room for objection, for both elements of onus ("satisfies") and quantum ("so that they feel sure") are maintained, if on a slightly less favourable note for the prisoner.[2] The second suggestion, however—merely "be satisfied"—seems clearly inadequate: "satisfied" can refer either to burden or quantum, but it cannot clearly refer to both. One element of the full direction may be lost—if it refers to burden, there is no direction on standard of proof; if to quantum, not only is there no direction on burden, but the word fails to indicate the special standard required in criminal trials.

A series of cases followed *Summers* which clearly reflected the uncertainty produced by this decision.[3] In the latest of these, *Hepworth and Fearnley* [1955] 2 Q.B. 600, the Court of Criminal Appeal quashed the conviction of two men for receiving after a trial in which the judge had merely directed the jury that they had to "be satisfied" of the elements constituting the offence. The Court of Criminal Appeal held that for an offence such as this, receiving, "be satisfied" alone was not enough.

In giving the judgment of the court, Lord Goddard, while stating that he might have misled courts by what he said in *Summers*, nonetheless adhered to his opinion regarding "reasonable doubt." However, later in his judgment, the Lord Chief Justice apparently restored the traditional formula to favour when he said: "One would be on safe ground if one said in a criminal case to a jury 'You must be satisfied beyond reasonable doubt.'" Lord Goddard continued: "One could also say—'you, the jury, must be completely satisfied' or better still 'you must feel sure of the prisoner's guilt.'"

[1] (1952) 36 Cr.App.R. 14.
[2] See Glanville Williams, "The Direction to the Jury on Burden of Proof" [1955] Crim.L.R. 464.
[3] See cases collected in article referred to in note 2.

What then of "be satisfied" *simpliciter*? Although its use resulted in the quashing of convictions in this appeal, it seems that it may be a proper direction in some cases, despite the foregoing and other criticisms. "It may be," said Lord Goddard, "that, in some cases, the word 'satisfied' is enough." It is submitted with respect that, quite apart from any other grounds of invalidity, a direction which may be proper in some cases only, which cases are unspecified and probably unpredictable on any *a priori* principles, is valueless in the criminal law. To the further objection that the direction "be satisfied" only lays down the same standard of proof as in a civil case, the Lord Chief Justice replied: "I confess that I have had some difficulty in understanding how there are or can be two standards." But that there *are* two standards seems clearly to be the law in view of decisions in the House of Lords,[4] Privy Council,[5] Court of Criminal Appeal[6] and almost[7] every other reported decision touching on the matter.

While it is clear that the validity of any direction to a jury should not depend upon the ritual use of set expressions or words,[8] nonetheless words of a particular mould are required in order to convey to the jury those rules generally understood to be basic tenets of English criminal law. It is surely preferable to use well-tried expressions which impress those rules on the mind of the jury than search after others which may or may not do so. The "beyond reasonable doubt" formula as traditionally used does at least stress both requirements of onus and quantum and its readmission into the fold is to be welcomed[9]; the same value does not, unfortunately, attach to "be satisfied," and it would be safer to avoid any reliance upon it.

Another aspect of the decision in *Hepworth* calls for comment. It has already been indicated that the trial judge failed to give any direction that the onus of proof was on the prosecution. Dealing with this, Lord Goddard used expressions which are obviously open to the construction that it may not be necessary in every case to direct the jury on the prosecution's burden. "It is always *desirable*[10] that a jury should be told that the burden of proof is on the prosecution." ". . . it is *desirable*[10] that they should be told that it is for the prosecution to prove their case. It is also *most desirable*[10] that emphasis should be laid upon that in a receiving case. In such a case, it is *generally desirable*,[10] although there may be circumstances in the particular case which would not render it necessary, to remind the jury first . . ." (Then followed the usual direction in receiving cases.)

4 *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391.
5 *Sodeman* v. *R.* [1936] 2 All E.R. 38.
6 *Carr-Briant* (1943) 29 Cr.App.R. 76; *Cohen* [1951] 2 T.L.R. 402, at p. 404.
7 See exceptions mentioned in Glanville Williams' article, *supra*.
8 *Kritz* [1950] 1 K.B. 82 and *Hepworth*, p. 603.
9 After having been "finally established" in *Mancini* [1942] A.C. 1, *per* Viscount Simon.
10 My italics.

These dicta raise a question of considerable importance—is direction on onus necessary and essential or merely "desirable"? If not necessary in some cases, how are those cases to be distinguished and classified? The apparent strength of the prosecution's case, the gravity or complexity of the offence charged, the intelligence of the jury summoned, the prevailing local crimes with whose elements the jury will be familiar,[11] or what?

It is submitted, with respect, that the need for a proper direction to the jury cannot in any case be dispensed with on grounds such as these or, indeed, on any others. It may be that a judge need not direct on every issue of *fact* in the case [12] but even as regards fact the jury is entitled to have the assistance of the judge [13] and failure adequately to put the defence to the jury is frequently a ground for quashing convictions.[14] *A fortiori*, it would seem that in regard to law, the particular province of the judge, a full direction is essential. There is abundant authority to that effect. In *Taylor*,[15] for example, it was said "This court has repeatedly drawn attention to the fundamental rule that juries are entitled to complete directions from the presiding judge on the law bearing on the case being tried." From time to time the Court of Criminal Appeal has strongly condemned a summing-up where no [16] or an inadequate [17] or a wrong [18] direction has been given. Indeed, in *Woolmington's* case, the House of Lords seems to have taken it for granted that a full direction on onus is necessary: "Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt." [19]

Authority to the contrary is meagre in the extreme. The strongest would appear to be *Smith*,[20] in which case Channell J. said: "It is not an invariable rule that juries must be told to give the prisoner the benefit of the doubt. In many cases it may be quite right to assume that they know that. They are told it over and over again by counsel, and a jury who try more than one case are usually told it several times by the judge." [1] An extraordinary case supporting the view of Channell J. appears to

[11] *Hepworth*, at p. 602.
[12] *Lovett and Flint* (1921) 16 Cr.App.R. 41.
[13] *Finch* (1916) 12 Cr.App.R. 77; *Bundy* (1910) 5 Cr.App.R. 270.
[14] See, *e.g.*, cases in note 13.
[15] (1921) 16 Cr.App.R. 4.
[16] *Burton* (1922) 17 Cr.App.R. 5; *Anderson* (1924) 21 Cr.App.R. 183; *Seckree* (1915) 11 Cr.App.R. 245.
[17] *Davidson* (1927) 20 Cr.App.R. 66.
[18] *Thomas* (1922) 17 Cr.App.R. 34; *Brain* (1918) 13 Cr.App.R. 197.
[19] [1935] A.C. 462.
[20] (1909) 3 Cr.App.R. 92.
[1] *Lawrence* v. *R.* [1933] A.C. 699, to some extent agrees that it may not be necessary to direct where both counsel have stressed the burden and have agreed on the issues. Apart from this uncertain qualification, the case supports the view contended for in this note.

be that of *Newman* [2] in which no direction at all, on fact or law, was given by the trial judge. Ridley J., giving the judgment of the Court of Criminal Appeal, dismissed the appeal saying: "It was a very plain case and it cannot be said to have contained any complication that made it necessary to point out the law to the jury; everybody knows what stealing is and what is receiving with guilty knowledge."

These cases are plainly poor material from which to challenge the true principle. It is not unknown for judges to misapprehend the law relating to the offences mentioned and the onus of proof generally [3]; to endow lay juries with omniscience in this respect is perhaps raising their stock a little high. That the contrary is the case was pointed out by Avory J. in *Lewis* [4]: "the jury not unnaturally are apt to think that when a defendant goes into the witness-box, the burden is on him to satisfy them of his innocence." So far as *Newman's* case is concerned, the Court of Criminal Appeal in *Burrell* [5] considered the decision "remarkable" and preferred to regard it as "a misprint"!

The better view, it is submitted, was laid down by Lord Hewart C.J. on the appeal in *Rees*.[6] At the trial, the judge omitted to direct the jury on onus of proof. "It is all important," said Lord Hewart, "that this caution should appear, either expressly or by necessary implication, in *every judicial summing-up*.[7] There is therefore a fatal flaw and the verdict cannot stand." [8]

In memorable words Lord Sankey once stressed that "the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." [9] It is not suggested that the dicta in *Hepworth* in any way constituted such an attempt, but it is submitted that a failure to maintain to the full these basic precepts cannot but do similar harm to the whole structure of the criminal law. At the present day, a number of factors combine to threaten this structure—for example, modern forms of communication frequently ensure that juries commence the trial of a prisoner with the prosecution's case already firmly fixed in their mind. Now more than ever, it seems, the rights of an accused person should be maintained at their highest. "Every citizen has an interest in

[2] Reported on appeal in (1913) 9 Cr.App.R. 134. The headnote contains the astonishing rubric: "In a simple case the judge is entitled to ask the jury whether they will dispense with the summing-up"!

[3] *e.g.*, *Davies* (1913) 8 Cr.App.R. 211; *Brain* (*supra*); *Lewis* (1919) 14 Cr.App.R. 33; and others.

[4] *Supra*, at p. 34.

[5] (1935) 25 Cr.App.R. 116.

[6] (1928) 21 Cr.App.R. 36.

[7] My italics.

[8] See also *Hayton* (1925) 18 Cr.App.R. 169. *Putland and Sorrell* (1945) 31 Cr.App.R. 27. "It is always necessary for the presiding judge to . . . warn the jury that upon the whole matter the onus is still upon the prosecution . . ."; *per* Humphreys J. at p. 33.

[9] *Woolmington*, *supra*.

seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law." [10] That these safeguards include the need for a full and correct direction to the jury on burden of proof cannot be doubted.

W. E. Denny.

Master and Servant

In *O'Reilly* v. *Imperial Chemical Industries, Ltd.*[1] the Court of Appeal (Singleton, Jenkins and Parker L.JJ.) reversed the decision of Oliver J.[2] The plaintiff was a lorry driver, employed by British Road Services. For many years he had been loaned with his lorry to the defendants. The practice was that the plaintiff took out his lorry in the morning from the B.R.S. depot and returned it there at the end of his working day; but throughout his working hours he acted under the instructions of the defendants for whom he loaded, transported and unloaded goods. B.R.S. paid his wages and reserved the right to dismiss him. He was injured when using defective and inadequate unloading mechanism supplied by the defendants.

Oliver J. had felt himself pressed by the authority of *London Graving Dock Co., Ltd.* v. *Horton*,[3] under which principle the plaintiff might be classed as a mere invitee of the defendants. If this were so the action would fail, since it was admitted that the plaintiff was aware of the dangers of the unloading mechanism. The learned judge, however, decided that the case could be distinguished from *Horton's* case on the ground that the protracted duration of the plaintiff's relationship with the defendants made him more than an invitee. He held that the defendants stood to the plaintiff in the position of "quasi-employers" [4] and he accordingly found for the plaintiff.

The Court of Appeal reversed this decision, taking the view that the plaintiff was a mere invitee. They felt that the strict burden of proof demanded by the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins and Griffith Ltd.*[5] in order to shift the responsibility from the general employers to the temporary ones was not satisfied. The plaintiff was given the exhilarating advice that he might "yet have a perfectly good claim against British Road Services." [6]

[10] *Lee Kun* (1915) 11 Cr.App.R. 293, *per* Lord Reading C.J., at p. 300.
[1] [1955] 1 W.L.R. 1155; [1955] 3 All E.R. 382.
[2] [1955] 1 W.L.R. 839; [1955] 2 All E.R. 567. Noted by the present writer, (1955) 18 M.L.R. 499.
[3] [1951] A.C. 737; [1951] 2 All E.R. 1.
[4] [1955] 2 All E.R., at p. 570 F.
[5] [1947] A.C. 1; [1946] 2 All E.R. 345.
[6] *Per* Parker L.J. [1955] 3 All E.R., at p. 388 A.

The crucial difference between Oliver J. and the Court of Appeal seems to have been on the plaintiff's ability to refuse the system of working offered by the defendants. Parker L.J., in order to show that the plaintiff was not under the defendants' detailed control, made much of the point that the plaintiff had admitted in evidence that he could have refused to work a dangerous system of unloading. But to this argument Oliver J. had surely already provided the answer, when he said that the plaintiff could have refused dangerous orders whether issued by the defendants *or* his general employers.[7]

It seems necessary to say that the Court of Appeal in this case was so unhealthily mesmerised by the master and servant relationship that they ignored the realities of the situation. The distressing aspects of the decision can best be seen by supposing that the plaintiff had been working with one of the defendants' own servants. If they had both been injured it would seem that I.C.I.'s own servant would recover, while the plaintiff's action would fail. This peculiar outcome could only be justified if in fact the plaintiff (not generally speaking, but while doing the act of unloading) stood towards I.C.I. in some position basically different from that of their own servant. But the fact is that the same pressures, namely fear of holding work up, fear of incurring displeasure, perhaps ultimately of dismissal, would operate both on the plaintiff and on I.C.I.'s own servant in causing them to carry out a dangerous task.[8]

This basic identity the Court of Appeal most lamentably failed to perceive. The decision proceeds on the dullest of mechanical tests—either the plaintiff is a servant (if so he wins), or he is an invitee (if so he loses). And the criticism is that these legal categories no longer adequately reflect the state of industrial organisation.

The decision also contains the expression of a heresy which should long since be dead. This is to be found in the judgment of Jenkins L.J. where he suggests that the action failed because of the absence of a contractual relationship between the defendants and the plaintiff.[9] But, as Lord Atkin demonstrated in *Donoghue* v. *Stevenson*,[10] the absence of a contractual relationship need not exclude liability in tort.

In their judgments the Court of Appeal regretted that the attention of Oliver J. had not been drawn to the *Mersey Docks*

[7] [1955] 2 All E.R., at p. 569 F.

[8] This point was well made by Oliver J. who said, at p. 569 I: "Just as they [the defendants] were in control of the loading, so they were in control of the unloading, except that the plaintiff could have said: 'I am not going to use that machine. I am going to take my load back home to Kearsley,' which was about fifty miles away. Had the plaintiff done so, he would have wasted the day, and would probably have been dismissed when he got there for not doing what the defendants had told him to do."

[9] [1955] 3 All E.R., at p. 388 C.

[10] [1932] A.C. 562.

and Harbour Board case. But it is equally regrettable that the attention of the Court of Appeal was not drawn to the judgment, in *Denham* v. *Midland Employers' Mutual Assurance Ltd.*,[11] of Denning L.J., where dicta in support of Oliver J.'s argument are to be found. A more fantastic omission is the failure to refer in the judgments to *Garrard* v. *A. E. Southey and Co., etc.*,[12] where, on what might seem to be weaker facts on the plaintiff's side, Parker J. (as he then was) found the temporary employers liable. It seems that in *O'Reilly's* case the matter did not appear to Parker L.J. as it appears to have appeared to him in *Garrard's* case.

G. B. J. Hughes.

The Custody, Maintenance and Education of Children

Galloway v. *Galloway* [1] may well become a classic example of the development of English law. Superficially it appears to concern the construction of a statute; in fact the decision of a bare majority of the House of Lords, and its background, illustrate the play of strong but largely submerged forces.

There can be little doubt that justice and wisdom, as well as logic, support the decision of three members of the House of Lords [2] that a provision that the court may make orders for the custody, maintenance and education of " children the marriage of whose parents is the subject of the proceedings " enables the court to make such orders on the basis of parentage and not legitimacy. But the path to this decision was long and costly, and victory was a very near thing.

The story starts in 1857 when section 35 of the Divorce and Matrimonial Causes Act provided that " in a suit or other proceeding for obtaining judicial separation or a decree of nullity of marriage and any petition for dissolving a marriage the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." Parliamentary draftsmen have modified over the years some of the language of their predecessors of nearly a hundred years ago, but

[11] [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561. Noted by the present writer, (1955) 18 M.L.R. 497.
[12] [1952] 2 Q.B. 174; [1952] 1 All E.R. 597.
[1] [1955] 3 W.L.R. 723.
[2] Lord Oaksey, Lord Radcliffe and Lord Tucker. Lord Simonds and Lord Cohen dissented.

the same intention is expressed more crisply in the Matrimonial Causes Act, 1950, s. 26 (1), in the words: "In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Following a decision of Barnard J. in 1951,[3] the Court of Appeal had twice recently held [4] that this wording did not permit the court, in matrimonial proceedings between H and W, to make orders for the custody, maintenance or education of their children born at a time when either H or W was married to a third person, unless the proceedings between the parents were for nullity of their marriage.[5] It is the dissenting opinions of Denning [6] and Singleton [7] L.JJ. that have now prevailed in the House of Lords. Thus Lord Tucker explicitly accepted the view of Denning L.J. that the language adopted by Parliament substituted the test of parenthood for that of legitimacy, and Lord Radcliffe leaned on the reasoning of both Denning and Singleton L.JJ. when he said [8] that if the rule as to the prima facie meaning of "children" is displaced in this subsection,[9] "it is displaced for good, and that it cannot be allowed to come back, as it were, for a second bite, by confining the illegitimate children contemplated to those born after an ostensible but void ceremony of marriage." He added: "I do not think that it is a right application of the rule of construction to read the word as extending to illegitimate children, but only to as few of them as possible."

Underlying the arguments on the construction of words lies the fundamental fact that some members of the Bench, cautiously but now discernibly, are showing an appreciation of the important part they can play in safeguarding the welfare of children whose natural guardians may be unmindful of their responsibilities to them, whether because they are preoccupied with asserting their matrimonial or parental rights, or for other reasons.[10] It is to be

[3] In *Harrison* v. *Harrison* [1951] P. 476.
[4] *Packer* v. *Packer* [1954] P. 15, where the court of Denning and Morris L.JJ. was equally divided, so that the decision of the Special Commissioner at first instance, following *Harrison* v. *Harrison*, *supra*, was upheld, and *Galloway* v. *Galloway* [1954] P. 312, where Singleton L.J. dissented from Jenkins and Hodson L.JJ.
[5] *Langworthy* v. *Langworthy* (1886) 11 P.D. 85 C.A. and see *Bryant* v. *Bryant* [1955] P. 164, C.A.
[6] [1954] P. 15, 21.
[7] [1954] P. 136.
[8] At p. 733.
[9] See note 5, *supra*.
[10] Such considerations surely underlie the recent assertion by the courts of the deserted wife's equity to remain in the matrimonial home, and the fact that such equity has to be established in the right of the wife and not that of the

hoped that this development will serve to crystallise and strengthen a growing public awareness that parents have duties towards the children for whose existence they are responsible, which may be more important to society even than their own rights over them.[11]

The real point about the wording which the House of Lords has now so rightly interpreted is that it is out of place in an Act primarily concerned with Matrimonial Causes. A better setting would be in a statute devoted to the interests and welfare of children and young persons.

O. M. Stone.

Whither the Law of Adoption?

Any review of the principles of the laws of adoption in the various countries of the world will serve to demonstrate how widely differing are the aims, approaches and methods employed. But if one matter is clear it is that there are two kinds of adoption: the dynastic (to provide an heir) and the philanthropic (to give the child a family—importing as an ancillary objective the notion of the family being given a child for the amelioration of the family life rather than due to any concept of the perpetuation of kinship).

The Adoption Act, 1950, which consolidated the previous enactments,[1] placed English law with minor reservations in the latter category.[2] The attitude of the courts, therefore, on problems before them have special significance since their decisions can do much to advance or retard the progress towards a model law of adoption. In *Re M (an infant)*,[3] the Court of Appeal, without dilating upon the policy of the Act, handed down a decision in keeping with this theme, whereas Karminski J. in *Best* v. *Best*,[4] whilst declaring his acceptance of the view that the general tenor of the Act was to put adopted children as nearly as possible in

children arises from the caution with which even the most daring of judges are prepared to develop the law.

11 Thus Lord Simonds, in his dissenting judgment, asked rhetorically at p. 728: "Is the mother to have less than her former rights to the custody of her natural child? Is the man whom she has married and alleges to be its father to be subject to new liabilities? Is he, when the years have passed and he has by his generous treatment of the mother's illegitimate child as his own lent colour to the allegation of his paternity, to be the victim of claims which he cannot then disprove?"

1 Adoption of Children Act, 1926; a similar Act was passed in 1930 applicable to Scotland; the Adoption of Children (Regulation) Act, 1939, dealing with adoption societies and agencies; Adoption of Children Act, 1949.

2 Not until the 1949 Act were succession rights given to adopted children of property from the adoptive parents. Even then pre-adoption order settlements *inter vivos* or wills executed prior to January 1, 1950, were excluded unless a contrary intention could be inferred. See ss. 13 and 14 and para. 4 of the 5th Schedule; also *Re Gilpin* [1954] Ch. 1. See generally Kennedy, "The Legal Effects of Adoption," 33 *Canadian Bar Review* 751 at pp. 835 *et seq.*

3 [1955] 2 Q.B. 479.

4 [1955] 3 W.L.R. 335; [1955] 2 All E.R. 839.

the position of children of the marriage, was unable—inevitably, it is submitted—to decide the case before him in accordance with those convictions.

In *Re M* (*an infant*), the court was asked to decide the short point whether a putative father was a "parent" within the meaning of that word in section 2 (4) (*a*) of the Act in connection with the necessity of obtaining a "parent's" consent to an adoption order,[5] the Act being silent as to the definition[6]; hitherto the practice of the varying courts possessing adoption jurisdiction appeared to vary.[7] The court held that a putative father was not such a "parent" as to make it necessary to obtain his consent to the adoption except in the cases where he was "liable by virtue of an order or agreement to contribute to the maintenance of the infant."[8] This decision, which will prevent putative fathers from obstructing the making of an order,[9] gives rise to the problem of the case where the putative father is maintaining or helping to maintain the child other than by virtue of an order or an agreement. In such a case consideration must be given as to whether a putative father who provides maintenance should not be allowed some say as to the desirability of the making of an adoption order.[9a] The

[5] The argument on behalf of the putative father was formidable, see Birkett L.J. (p. 491) and Romer L.J. (p. 493).

[6] s. 59 of the Children Act, 1948, defines a "parent," in the course of which the putative father is expressly excluded.

[7] During the course of the hearing Romer L.J. commented: "I have a notion that in the London area the natural father, if known, is always approached as a matter of procedure," *The Times*, June 23, 1955. See also Harman J. in *Re A* (*an infant*) [1955] 2 All E.R. 202 at p. 205, asterisked footnote and (1955) 18 M.L.R. 490, note 4. *Cf.* the view of the Report of the Departmental Committee on the Adoption of Children, Cmd. 9248, para. 103, p. 26. For a review of the Committee's recommendations, see (1955) 18 M.L.R. 274. See also *R.* v. *Leeds City Justices, ex p. Gilmartin* (1951) 1 C.L.C. 4853, where although the facts appear equivocal, an order of certiorari was granted to quash an adoption order where the father (*sic*) was not given notice and therefore did not consent. On the quashing of an adoption order, see *Walters* v. *Phillips* [1955] 3 D.L.R. 840. If, before the making of the order, the putative father marries the mother thereby legitimating the child, his consent will probably be necessary even though the mother had given her consent and had not withdrawn it, see *Re LeSieur* [1951] 2 D.L.R. 775, on a similar provision in the Ontario Adoption Act. Also *Re G., G. et Ux.* v. *C. et Ux.* [1951] 3 D.L.R. 138, where the provision of the British Columbian Adoption Act excluded the putative father in the list of persons requiring consent to be sought. See also *A* v. *C-S* [1955] A.L.R. 943; *A* v. *C-S* (*No.* 2) [1955] A.L.R. 979.

[8] s. 2 (4) (*a*). *Cf.* s. 2 (3) of the 1926 Act which was phrased more generally to the effect that his consent was required if he was liable "to contribute to the support of the infant." *Quaere* also the position of a step-father who has voluntarily contributed towards the child's maintenance.

[9] See *L* v. *M and another* (1956) 102 J.P. 26 where, however, the father was its natural father but the facts of which illustrate the point. See also the restricted interpretation given to "unreasonable withholding of consent" in s. 3 (1) (*c*), (1953) 16 M.L.R. 225. See also *W and another* v. *D and another*, *The Times*, December 20, 1955.

[9a] The New Zealand courts experienced a similar difficulty, *Mark* v. *Goulding* [1947] N.Z.L.R. 338. By s. 26 (1) (*a*), (2) of the Statutes Amendment Act, 1947, it was enacted that a parent does not include a natural father of an illegitimate child, but the magistrate may in any case require the consent of

recent Committee's recommendation that his views should be heard but that his consent need not be sought represents a sensible compromise.[10]

In *Best* v. *Best*, a divorced wife applied under the provisions of section 25 of the Matrimonial Causes Act, 1950, to vary the terms of an ante-nuptial settlement. The parties were married in 1935; in 1945 a child, Timothy, was adopted and in 1947 a son, Anthony, was born. In 1954 the marriage was dissolved on the grounds of the husband's adultery. Apart from a substantial maintenance agreement which the court sanctioned, the mother sought the variation of the settlement by three alternative means. The substantial part of the application and upon which the case is primarily reported was that Timothy, the adopted child, should benefit as though he were issue of the body of the marriage and so bring him within the terms of the settlement which otherwise he was precluded from taking under.[11] It was sought, however, to show on an analogy of the cases decided under section 25, where the court could vary a settlement by creating a power enabling a child or a wife of a future second marriage to share in the benefits of the trust, that similarly an adopted child could benefit. Karminski J. was content to rest his decision, in declining to allow a variation, upon these cases which he pointed out only allowed variation when the children at present benefiting received concurrent financial advantage which, though it need not be purely financial, must be substantially so[12]; in this case the consequences of any variation would result in considerable financial sacrifice on the part of the natural child, Anthony.

Whilst one might have hoped for an extension of the section 25 cases to adopted children there appears to be even more fundamental objections to a successful application. The main purpose of the power under the section is to put the children of the marriage in the same position, so far as is possible, as if the marriage had

the natural father if in his opinion it is expedient in the special circumstances to do so. See Campbell, *Law of Adoption in New Zealand* (1952), pp. 23–24.

10 Para. 104, p. 26. This is coupled with a recommendation on s. 3 (1) (*c*). See note 9, *supra*, also *Watson* v. *Nikolaisen* [1955] 2 Q.B. 286; and a Privy Council case *Murray* v. *Mace*, *The Times*, October 11, 1955, an appeal from the High Court of Australia, *Murray* v. *Mace* [1955] A.L.R. 292, reversing the Full Court of the N.S.W. Supreme Court, *Re Murray* (1955) N.S.W. (S.R.) 88 who by a majority reversed the trial judge, *Re Murray* (1953) 70 W.N. (N.S.W.) 251, where the court applied the proviso to s. 167 (*d*) of the New South Wales Child Welfare Act, 1939–1952, which allows dispensation "where, having regard to the circumstances the courts deem it just and reasonable so to do."

11 Adoption Act, 1950, s. 13 (2).

12 He was driven to concede this much in view of the decision in *Garforth-Bles* v. *Garforth-Bles* [1951] P. 218, where Pearce J. had allowed the importance of the father-child relationship to influence his decision in allowing a variation of the settlement. It is interesting to observe that Karminski J. appeared in that case as counsel for the husband.

not been terminated.[13] So far as the adopted child was concerned the fact of the dissolution of the marriage placed him in no different position as regards the settlement. Moreover, it would be an absurd result if the adopted child of a dissolved marriage could benefit by a variation whereas whilst the marriage subsisted no variation would appear to be possible since the decision in *Chapman* v. *Chapman*[14] unless there appeared to be a genuine dispute arising out of a clause in the settlement upon which a compromise could be sanctioned[15] or the property comprised in the settlement was settled land.[16] *Best* v. *Best* is yet another example of the injustice that is being perpetrated on adopted children due to the provisions in section 13 of the Adoption Act, 1950. In the case of settlements the solution can best be sought by more frequent use of the adopting court's power to demand provision for the child as a condition to the making of an order. Section 5 (2) of the Act provides that "the court in an adoption order may impose such terms and conditions as the court may think fit, and in particular may require the adopter by bond or otherwise to make for the infant such provision (if any) as in the opinion of the court is just and expedient."[17]

[13] *Hodgson Roberts* v. *Hodgson Roberts* [1906] P. 142, *per* Sir Gorell Barnes P. at p. 144. See generally on variation of settlements, *Constantinidi* v. *Constantinidi* [1905] P. 253; *Prinsep* v. *Prinsep* [1929] P. 225 at p. 236, *per* Hill J. and [1930] P. 35 at p. 46 (C.A.); *Maxwell* v. *Maxwell* [1951] P. 212.

[14] [1954] A.C. 429. See (1954) 17 M.L.R. 473 and (1954) 70 L.Q.R. 473.

[15] *Re Lord Hylton's Settlement* [1954] 1 W.L.R. 1055. The Matrimonial Causes Act, 1950, s. 25, is unaffected by the decision in *Chapman* v. *Chapman*, see *Thomson* v. *Thomson & Whitmee* [1954] P. 384; in *Re Powell-Cotton's Resettlement* [1956] 1 All E.R. 60; [1956] 1 W.L.R. 23, the Court of Appeal applied *Chapman* v. *Chapman* in refusing to substitute a modern investment clause for an old-fashioned clause in a settlement as originally drawn.

[16] *Re Simmons* [1956] 2 W.L.R. 16; [1955] 3 All E.R. 818. The Settled Land Act, 1955, s. 64, appears to confer wider powers on trustees than the Trustee Act, 1925, s. 57. An amendment enlarging the scope of this latter section has been advocated in a report by the Inns of Court Conservative and Unionist Society, *The Times*, December 14, 1955. A letter to *The Times* (December 19, 1955) suggests an inclusion in any legislation of power to vary a pre-1950 settlement bringing in adopted children.

[17] This re-enacted the 1926 Act, s. 4, which followed the recommendation of the Tomlin Committee Cmd. 2401, para. 19, p. 7, which contemplated the tribunal in sanctioning the adoption having the power, if it thought fit, to require that some provision for the child should be made including for example a "covenant secured by a bond to make testamentary provisions up to a given amount or a portion of his estate." In Halsbury, 3rd ed. (1955), Vol. 12, p. 451, note (d), the suggestion is made that there is power to vary settlements where the settlement took place *after* the adoption order, *Best* v. *Best* dealing with the reverse situation. Certainly in a post-1950 settlement but pre-adoption order, by the rules of construction, an adopted child was deemed to be, unless shown to the contrary, a "child of the adopter." In the case of a pre-1950 settlement it is hard to see that a variation can be made invoking the Adoption Act, 1950, s. 10, which must be read subject to ss. 13 and 14. Any other rule would, as illustrated above, favour the adopted child of a dissolved marriage. Moreover, Karminski J. in *Best* v. *Best* expressly rejected the applicability of the provisions of the Adoption Act, 1950, s. 10, which are concerned with the extinction and conferment of the rights, duties, obligations and liabilities in relation to the custody, maintenance and education of the child. See Kennedy, *op. cit.*, p. 773.

Might not the realisation of this power redound to the mutual advantage of adopted children and beneficiaries under settlements —a benefit which may well form another not insignificant exception to the rule in *Chapman* v. *Chapman*?

L. J. Blom-Cooper.

Matrimonial Property and the Conflict of Laws

A case of interest to family lawyers and conflict lawyers has recently come before Wynn-Parry J. in *Re Bettinson's Question* [1955] 3 W.L.R. 510. The facts were as follows: Mr. and Mrs. Bettinson were domiciled in California, though resident in London. In January, 1955, they separated and, six months later, the husband instituted divorce proceedings in California. The English dispute, however, arose out of the fact that, in April, 1955, the wife had removed from her husband's maisonette, *inter alia*, various papers of his, his diary for 1954, and a judgment in his favour. She had also removed his car from the garage where he had taken it for servicing and had refused to return it. In May, 1955, the wife, with the aid of her sister in America, drew out of the parties' joint banking accounts with two banks in America the sums of $11,600 and $6,500, representing savings from the husband's earnings. Both these sums were remitted to and received by the wife in London.

By Californian law, community of property applied to both parties, section 172 of the Civil Code of that state giving the husband management and control of the personal property held in community.

The court found that the parties had met at the offices of certain London solicitors at the end of January, 1955, and had agreed to keep—until such time as their matrimonial disputes should be settled—the community property intact and that neither of them should draw on the joint accounts. It was clear, therefore, that the removal of all the items taken by the wife amounted to a breach of contract by her. The husband now sought by a summons under section 17 of the Married Women's Property Act, 1882, an order for the return of the chattels and an account and inquiries in respect of the sums drawn out of the joint account. It was contended for the wife that since no more than the right to manage and control the community property was given to the husband by the Californian law, no question of "possession," as used in section 17, could arise. There was admittedly no question of title at issue. Wynn-Parry J. held this argument to be groundless, saying that the husband [1]

[1] At p. 513. It was not suggested for the wife that any law other than Californian law could apply to their matrimonial property rights. Indeed,

> "must be entitled to possession of that property, either to physical possession or to such a degree of control as will enable him effectively to say what is to happen to that property."

It is interesting to note that a similar view has been taken by Justice Preston in *Re Thornton's Estate*,[2] where he says, with reference to section 172 of the Code,

> "it has been consistently and repeatedly held that any interference with the right of ownership or dominion over the common property is a disturbance of a vested right of the husband."

Wynn-Parry J. indicated that some of the items taken by the wife were "entirely personal to" the husband, and instanced the diary as an example. Although he had said at the commencement of the judgment [3] that he was "not concerned with the extent of (the) community of property," he nevertheless proceeded to say later on that the Californian courts would have ordered the return of these "personal items" to the husband.[4] He did not indicate why he classified these items as "personal"; one might, perhaps, assume that he did so because they fell within the definition of "separate property" contained in section 162 and section 163 of the Californian Code. If this was the case—the report does not say—one must then applaud his classification of the property in question by the true *lex causae*.

In the result, besides ordering the wife to return the diary, the court ordered the return of the car (which it treated as being community property) and the other items of community property and property personal to the husband which had been removed, and directed an account and inquiries in respect of the sums withdrawn by the wife from the American banks.

From the point of view of conflict and family lawyers, the case is of interest for two reasons; first, that the main purpose of the 1882 Act was to substitute for the common law system of coverture a statutory system of separation of goods, and yet one of its provisions has now been held to cover a situation which arises only out of a system of matrimonial property not envisaged by the Act at all, and, secondly, that it is possible to invoke section 17 in cases containing a foreign element so far as the parties are concerned so long, presumably, as they were validly married according to the rules of English private international law.[5]

it is hard to see what other law could have been applicable in an English court since *De Nichols* v. *Curlier* [1900] A.C. 21. See, too, *Restatement on Conflict of Laws*, para. 289.

2 (1934) 92 A.L.R. 1343 (Supreme Court of California); Cheetham, Goodrich, *et al.*, *Cases and Materials on Conflict of Laws*, p. 804, at p. 805.

3 At p. 511.

4 At p. 512.

5 Thus it is thought that parties to a polygamous marriage or to a void marriage could not invoke the section. *Qu.* if the wife had been out of the jurisdiction, could she have been served abroad under R.S.C., Ord. 11, r. 1 (*c*) assuming her to have been ordinarily resident in England?

Further, under section 17, with regard to possession the question to be answered is always: "Who has the right to possession?" rather than "Who has possession?", and the learned judge has held that a vested right to management and control is the same as a right to possession. In passing, it may be pointed out that in English law the factum of legal possession is not always equivalent to management and control; *e.g.*, a master possesses his goods, but his servant may control and manage them.

The rule that what is or is not possession is a matter for the *lex situs* was not abrogated by the reference to the law of California, because it was not the conception of possession that was being considered. The only question was whether the rights given by the domiciliary law to the husband amounted to the right to possession. It therefore follows—indeed it is implicit in the judgment of the court—that had the domiciliary law not given "control and management" of the community of goods to the husband, the court would have had no jurisdiction and, so far as the car was concerned, the husband would have been remediless however much the forum might have regarded it as "his" car.[6] However, this result would be quite in keeping with principle, for there is no *a priori* reason for investing foreign domiciled persons with even possessory rights over personalty unless such rights have been granted by their domiciliary law. A limping car would be just as unfortunate as a limping marriage.

R. A. Basker.
P. R. H. Webb.

No Presumption of Death

The defended petition in *Chard* v. *Chard & Ors.* [1955] 3 W.L.R. 954; [1955] 3 All E.R. 721, has again raised the subject of the nature and limits of the presumption of death. The principal parties went through a ceremony of marriage in England in the year 1933. In 1952 the "husband" petitioned for divorce on the grounds of adultery and desertion, and the respondent's answer made similar charges against him; but in 1955 both parties amended their pleadings, and asserted that the ceremony of 1933 was a nullity. This was the issue at the trial. It was undisputed that the petitioner had been married to another woman in 1909, and the validity of the later ceremony depended on whether this woman was alive or dead in May 1933. The petitioner had not heard of her since 1917 at the latest. In that year, in consequence of his career of crime, he was again sentenced to imprisonment; and he remained in prison for a period of sixteen years, only broken by trifling spells of liberty in which he qualified for return there.

[6] He could not, of course, have sued his wife in tort, but, on the facts of the case, he might have succeeded in an action for breach of the contract made in January, 1955.

He also heard nothing of the woman married in 1909 between the years 1933 and 1949, most of which he spent in confinement. There was evidence that searches at Somerset House had disclosed no entry of the death of the woman married in 1909. After the ceremony in 1933 the petitioner wrote to the respondent, saying that he had seen his first wife not long since; but in the witness-box he retracted this statement, which the learned judge disbelieved. The issue had therefore to be decided on other grounds.

Sachs J. held that there was no presumption of law as to death which applied, because there was no one who had been shown to be likely to hear from the woman married in 1909. There were many factors which might lead her not to wish to be heard of by the petitioner or his family, and there was no one who would naturally have heard of her. He accordingly held that the case had to be determined on the facts, and in effect he applied the presumption as to continuance of life, holding the woman to be alive in 1933 and granting a decree of nullity. In his review of the authorities he came to conclusions which may be summarised thus—(1) There is a presumption of fact as to continuance of life, which may be rebutted by establishing death. (2) Various statutory embodiments of the presumption of death, based on absence for seven years, were irrelevant; and decisions or dicta on these provisions are not of general application. (3) There is a presumption of law as to death independent of statute. "That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards 'A. B.' there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly that those persons have not heard of him, and thirdly that all due inquiries have been made appropriate to the circumstances, 'A. B.' will be presumed to have died at some time within that period." (4) When there is no presumption applicable, the issue whether a person is or is not to be presumed dead is generally speaking one of fact.

The first proposition is established law. The second proposition calls for no immediate comment. The fourth proposition is not worded very felicitously, as the issue is whether an absent individual is dead, not whether he or she is to be presumed dead. But if the proposition is merely that, when there is no direct evidence of death and no presumption of death is applicable, the tribunal may draw an inference from such facts as are proved, probably no lawyer would contest it. More dubiety, however, surrounds the third proposition.

Even though the learned judge disclaimed exactitude of expression, he treated the terms of the proposition as conditions of the application of the presumption at common law; and it seems desirable to consider whether the presumption of death cannot be

applied in the absence of one or more of those conditions; in other words, whether a party relying on the presumption has the burden of proving compliance with them all. The first condition is that there are persons who would be likely to have heard of the absent individual during the relevant period. Apart from the question whether the existence of one such person might not satisfy the condition, and the interpretation of "likely," it is far from clear that the presumption does not apply to the death of an individual who would have been unlikely to communicate with his relatives or previous acquaintances. It is true that there is some early authority to this effect, but later decisions appeared to the editors of a standard work as throwing doubt on this restriction (Halsbury, *The Laws of England*, 2nd ed., vol. 13, p. 632), and perhaps to the writer of an article in this review (vol. 17, p. 532). To cite only one example, in *Willyams* v. *Scottish Widows' Fund Life Assurance Society* (1888) 4 T.L.R. 489; 52 J.P. 471, Stephen J., who was not unfamiliar with the niceties of the law of evidence, did not observe any such restriction.

The third condition—that all due inquiries have been made—is even more open to question. Doubtless there were cases in which the court required inquiries (for example, *Re Creed* (1852) 1 Drew. 235), though the nature of the presumption concerned is not always clear. Nevertheless, there was little or no binding authority for the view that the law demanded inquiries in every case. In 1870 Giffard L.J. reviewed the decisions in the case of *Re Phené's Trusts*, L.R. 5 Ch. 139, but did not state this condition; and in 1876 Stephen was apparently ignorant of it (*A Digest of the Law of Evidence*, 2nd ed., art. 99). It was probably not until the following year that inquiries were said to be essential. In *Prudential Assurance Co.* v. *Edmonds* (1877) 2 App.Cas. 487, the legal peers were equally divided, so the House of Lords decided nothing. However, in the course of his speech Lord Blackburn said that it appeared from *Doe* v. *Andrews* to be necessary that there should be search and inquiry among those who would be likely to hear of the absent individual; and to support this view he surprisingly called in aid "not quite an analogy," that is, search for a lost document as a condition of the admission of secondary evidence (at p. 509). With due deference to this experienced lawyer, there is reason to think that Lord Blackburn did not accurately recall the details of the case cited, which he had apparently reported many years before. In *Doe* d. *France* v. *Andrews* (1850) 15 Q.B. 756, there were some interpolations from the Bench during argument on the need for inquiry, which was the ground of the brief decision; but the remark of Coleridge J. makes it clear that the court considered some form of search as an alternative to want of communication with the absent individual. Coleridge J. said —"Either the lessor of the plaintiff might have produced some person who would naturally have heard of the *cestui que vie*, if

he was alive, or he might have called those who had made search for such a person, and would have found him if he had existed" (15 Q.B. at p. 760).

Though there is some lack of clarity as to who should carry out the search, this appears to be the more reasonable rule. If there are persons who would be likely to hear of the absent individual during his life, but they do not hear of him for seven years, in many cases searches would be either impracticable or futile; but if there are no such persons, for whatever reason, the party relying on the presumption might well be required to institute a search. An illustration of the latter position is provided by *Tweney* v. *Tweney* [1946] P. 180; [1946] 1 All E.R. 564, though the point was not argued. If this alternative application of the rule is recognised, it follows that search should not be confined to persons who would naturally have heard of the absent individual, for Coleridge J. presupposed that no such person could be produced. It follows further that the absence of such persons does not necessarily exclude the operation of the presumption.

Particularly in matrimonial cases, the fact that no inquiries have been made may affect the cogency of the evidence that the absent individual has not been heard of for seven years or more. This was pointed out by a Divisional Court in *Chipchase* v. *Chipchase* [1939] P. 391 at p. 394; [1939] 3 All E.R. 895 at p. 897, when it was expressly stated that inquiries were not necessary. However, the absence of inquiries has recently been regarded as excluding the operation of the presumption of death, as appears not only from *Chard* v. *Chard*, but also from the decision of a Divisional Court in *Bradshaw* v. *Bradshaw* (1954), now reported in [1955] 3 W.L.R. 965. Despite the attempt of Sachs J. to reconcile the cases of 1939 and 1954, to some they will appear contradictory. A further complication occurred when Harman J., under the impression that he was conforming in the Chancery Division to the rule in divorce and criminal cases, treated the absence of adequate search as not excluding the operation of a presumption of death, though whether he regarded it as a presumption of law or of fact is not clear (*Re Watkins* [1953] 1 W.L.R. 1323; [1953] 2 All E.R. 1113). In this state of the law, there seems to be room for a pronouncement by a superior appellate court, in addition to the recent reference to *Chard* v. *Chard* in the Court of Appeal (*Ward* v. *Ward*, *The Times*, February 10, 1956).

G. D. Nokes.

How Much is Much Too Much?

British Oxygen Co. Ltd. v. *South West Scotland Electricity Board* 1955 S.L.T. 306, answers many questions, but deliberately left open that used as a title. It is perhaps as important for the unanswered question as for the answers. The case arose out of

the issue of new tariffs for the supply of electricity. The pursuers, who were users of high-voltage electricity, claimed that the new tariff showed an insufficient discrimination in favour of high-voltage consumers as against those of low-voltage electricity; some discrimination in favour of the former being admittedly justified by the losses of power involved in transforming to low-voltage. Their claim for the reduction (or quashing) of the tariff was based on the argument that the practice of adding to the basic charge, a fuel variation charge (dependent on the price of coal) had resulted in too small a difference between the two rates. Although the basic charge differed, the fuel variation charge had at one stage been the same for both types of consumer, though subsequently differing slightly, with the result that the proportionate difference between the two rates had steadily diminished. Whereas the difference was originally 5·55d. per cent. when the price of coal was 38s. per ton, it had sunk first to 3·78d. per cent., and, under the most recent tariff, to 3·74d. per cent. A greater discrimination was in fact made by other Boards.

The defenders' plea, which was in issue at this stage of the proceedings, was the broad one that the action was irrelevant. In the Second Division a proof before answer was allowed. In effect what was left undetermined was whether the averments of fact were sufficient to justify a charge of undue discrimination. Though doubtless important from the point of view of the parties (it was alleged by the pursuers that "overpayments" already exacted amounted to £10,000), that question is not of such general importance as others which were conclusively answered in the opinions. First there was a considerable clarification of the meaning of the phrases "undue preference" and "undue discrimination" as used in the Electricity Act, 1947. It was made clear that similar customers could no longer claim equal treatment as of right: all that they could claim was that differences should be reasonable. But it was also made clear that questions of undue preference could arise not merely between those taking under one tariff, but also between substantially different customers who took under different tariffs. Like need not be compared to like. On this basis it was clearly important to determine the factors which could be taken into account in determining "undueness." Suggestions (based on *Att.-Gen.* v. *Long Eaton U.D.C.* [1914] 2 Ch. 251) that the phrase undue preference could not cover cases of mere excessive charging, but only cases where some wrong element had entered into the calculation, were rejected. It is at this stage of the argument that the view of the Lord Justice-Clerk, that old principles must be reconsidered in the light of the radical changes in the structure of the industry brought about by the 1947 Act, becomes important. Perhaps applying this principle Lord Patrick went on to assert that in determining whether or not charges on a particular type of consumer were excessive or not the court

should have regard to the financial purposes of the Boards. "It seems to me," he said, "that the charges are to be related to the overall costs of the Central Authority and the Area Boards, including the formation of reserve funds, and it is not contemplated that the Authority or the Area Boards will be profit earning. Neither the Central Authority nor the Area Boards are therefore free to charge any rates they care. There is a maximum beyond which they cannot go." To assert this is to give a very different effect to the general statutory obligation to balance the books taking one year with another. On this basis the obligation is no mere wishful thinking in statutory form but has force and body. It is very different from the approach suggested elsewhere, as in the Cameron Report on Railway Wages,[1] which tended to make the phrase nebulous and ineffective. There is moreover inherent in Lord Patrick's dictum a belief that the courts are to judge when the year of reckoning has arrived. Again a contrasting interpretation.

Indeed there runs through the case a clear refusal to see the jurisdiction of the court excluded either by administrative procedures—complaint to consumers' councils and the like—or by statutory drafting which leaves out all standards for judgment. The court was pressed with arguments for the exclusion of the jurisdiction of the courts, based largely on the broad phraseology of the Act, and on the administrative inconvenience of the challenge of tariffs by litigation. It was admitted that there was force in these arguments, but the decision goes far to meet them. In claiming jurisdiction it was made clear that judicial control was not intended to be close, or to exclude administrative remedies. It is evident that before the courts will intervene what must be shown is substantial injustice. Thus the Lord Justice-Clerk asserted "The Dean [*scil.* of the Faculty of Advocates] may be right that it is irrelevant merely to say 'I am being charged too much,' but the situation is different where I say 'I am being charged much too much,'" and later, "It is not likely that any judge will . . . take a narrow or pettifogging view." The question of excess or undueness was as Lord Patrick put it "a matter for broad consideration," or as Lord Mackintosh said "a broad jury question." The door to the courts is open, but there is no great welcome inside except for those with a strong case. In lesser

[1] Final Report of a Court of Inquiry into a Dispute between the British Transport Commission and the National Union of Railwaymen, 1955 (Cmd. 9372) § 55. "We apprehend that it (the statutory injunction to balance accounts) must be regarded as a direction to the Commission so to conduct its affairs that, over such a reasonable tract of time as their experience and discretion show to be appropriate, their revenues and expenditure are brought into balance." The report also considered deficits legitimate for the Commission "provided that in their long term estimate of their prospects they can see their way to an overall balance." These views evidently robbed the injunction to "break-even" of any real force and at the same time reserved the question of balance almost exclusively for the Commission. In some ways these views can be said to be carried even further by the Interim Report (Cmd. 9352).

matters the suggestion is that administrative remedies through consumers' councils are adequate and should be used. For this division of function there is much to be said. The threat of direct intervention by the courts should ensure that tariffs are drawn upon justifiable principles, and at the same time a mass of litigation is avoided. Adherents of strict theories of the separation of powers may quibble, as may both ardent devotees and denunciators of judicial control. Yet in a practical world the most that can be hoped is that functions should be entrusted to bodies (however classified) whose structure and methods are best suited to their discharge. That is in effect what this decision does. The sledge-hammer is kept for the boulders: nuts are to be cracked by other methods.

J. D. B. Mitchell.

Westminster Bank *v.* Lee: An Alternative Interpretation

Mr. Hamish Gray in (1955) 18 M.L.R. 596 has pointed out the difficulties of fitting the decision in the above case into the general scheme of equitable interests. It does seem that the deserted wife has more in common with the owner of an interest under a settlement, which may include a separation agreement, than a person applying to set aside a transaction for fraud or mistake. On the other hand something can obviously be said for the view that the wife's "equity" is of a more tenuous character than an equitable interest in property. Where X is trustee of property for Y the rights of Y in equity to that property are well recognised and not subject to much discretion on the part of the court. On the other hand there is an increasing number of cases where the court has a wide statutory discretion. Two references may help to show how the courts are thinking. In *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 (C.A.) the Master of the Rolls emphasised that the court was often in great difficulties when making orders under section 17 of the Married Women's Property Act, 1882, in deciding what property belonged to each spouse, and referred to "Solomonesque judgments" and "Palm-Tree justice." It would be difficult to say that the wife had a clear equitable interest in any of the assets in question such that a purchaser would take subject to it unless he obtained the legal estate. Denning L.J. in *Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152, 157 referred to other statutes which conferred a discretion on the court to make an order for possession, *e.g.*, an order against a controlled tenant under the Rent Restriction Acts, where the statutory tenant has no "interest" in the land but enjoys the benefits of a provision preventing the court making an order for possession. *Bull* v. *Bull* [1955] 1 Q.B. 234 (C.A.) is somewhat similar. There section 30 of the Law of Property Act, 1925, gives the court power to order a sale on such terms as it thinks fit and the court held it had power to evict one of the equitable owners or to order her to remain in undisturbed

possession, in its discretion. Where a tenant forfeits a lease his position under section 146 of the Law of Property Act is subject to the exercise of a discretion by the court to award or refuse relief. If it does give relief it may have to give him a new or restored lease, so that the old lease appears to be liable to vanish in the meantime, though the new lease is subject to the same terms and charges as the old. The same problem arises in the case of forfeiture for non-payment of rent. The Inheritance (Family Provision) Act of 1938 is another example of a discretion to award maintenance without presupposing any interest in any specific assets of the testator. The Intestates' Estates Act, 1952, Sched. 2, para. 4 (5) makes the widow's claim to retain the family home towards her intestate share subject to the claims of purchasers from the personal representatives. All these developments show a mind in the legislature very similar to the judicial attitude in cases like *Lee's*.

The wife has to apply to the court under the 1882 Act for an ultimate order defining her rights to and in the matrimonial property. In this sense there is some analogy to the cases on applications to the court for the rectification or setting-aside of prima facie valid transactions, which have been the typical instances of "mere equities." The courts have held that an order can be made restraining the husband from evicting the wife (*Lee* v. *Lee* [1952] 2 Q.B. 489n. (C.A.)). The judges assume that the making of such an order will prevent a purchaser obtaining a clear title, but no details are given. Section 6 (1) (*a*) of the Land Charges Act provides for the registration of orders —— for the purpose of enforcing a judgment —— affecting land, and such registration is binding on purchasers by virtue of section 7 of the Act.

Of course all of this is a matter of degree. There are still old-fashioned lawyers who think of all equitable interests as mere rights to bring proceedings against the trustees *in personam* in Chancery. The case of *Cave* v. *Cave* (1880) 15 Ch.D. 639 shows that equity regarded owners of beneficial interests as having interests in the actual assets from time to time. The burden this imposed on purchasers was considerable. The Law of Property Act, 1925, s. 2, protects the purchaser if the disposition takes effect under a settlement or trust for sale. If a "simple trust" of land exists, *e.g.*, A on trust for B, the purchaser may still be troubled by notice of equities if there is any departure from the procedure laid down for sale in the settlement, since there is no corresponding provision in this case. There was a clear breach of trust in *Cave* v. *Cave*, but it is not clear that that was the limitation of the decision. In *Bull* v. *Bull* (*supra*), the court first brought in the concept of the trust for sale for the mother and son in equal shares before dealing with his power to give a good title to a purchaser.

I should therefore conclude that *Westminster Bank* v. *Lee*

(*supra*) is supported by considerable authority on the particular field involved, *i.e.*, the discretion of a court to give relief on such terms as it thinks fit. It is too late to complain that such a discretion creates " monsters "—interests which may not be neatly classified within the classical scheme of interests in land. Mr. Gray's strictures would be more telling if the courts had claimed to create new equitable interests on their own initiative, but I interpret the decision in *Lee's* case as resting largely on section 17 of the Married Women's Property Act of 1882, and that the dicta which would confer on judges power to create new equitable interests apart from statute will not now need to be followed in order to protect the deserted wife.

That the results of piecemeal legislation creating judicial discretions are obscure and irritating is undeniable especially where third parties are prejudiced. The legislature ought to make up its mind which are the fields in which " notice " and " conscience " may still legitimately figure, and those fields in which the honest purchaser should be fully protected. The general intention of the legislature is to protect the ordinary purchaser. The particular intention of the legislature in preserving such ideas as " constructive notice " of equitable claims seems to conflict with this general policy. I think it might well be time to abandon too strict a medieval notion of " conscience " and apply business notions and the avoidance of hardship in everyday commercial transactions with land. If Parliament moves in the opposite direction, *e.g.*, by substituting notice for registration of certain land charges, such a movement would seem to be regrettable. The burden of taking precautions ought to be placed on that person who is aware of his rights and interested in protecting them, not on purchasers who may technically acquire some type of notice or even, in some cases, be bound by some interest even though they could not reasonably have known of it. Albert Kiralfy.

Editorial Note

Romford Ice & Cold Storage v. *Lister* [1955] 3 W.L.R. 631; [1955] 3 All E.R. 460, C.A.

Prince Ernest of Hanover v. *Att.-Gen.* [1955] Ch. 440; (on appeal, [1955] 3 W.L.R. 868; [1955] 3 All E.R. 647).

G. H. Renton & Co. Ltd. v. *Palmyra Trading Corp.* [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209, C.A.

Notes on the above decisions of unusual importance have been held over as it is understood that appeals are likely to be taken to the House of Lords.

REVIEWS

The Road to Justice. By the Rt. Hon. Sir Alfred Denning. [London: Stevens & Sons, Ltd. 1955. viii and 118 pp. 10s. 6d. net.]

In the last two years Lord Justice Denning has delivered a number of addresses in South Africa, Canada, and the U.S.A. These addresses, as I can testify, made a great impression on those who heard them and they will be equally appreciated by a still wider public to which they are now made available. Their aim is to set out the principles which go to make a fair trial—a worthy aim indeed when, as the learned author says in his preface, the decision of so many disputes is entrusted to outside tribunals.

To those familiar with Lord Justice Denning's judgments and other writings (and that will include most readers of this *Review*), these addresses contain little that will be new or surprising. They should be read, however, as a masterly summary of his philosophy that it is the job of the courts to administer justice and not merely to apply the law. In these pages this belief is expounded with all the learned author's enviable clarity and simplicity of style and flair for apposite and vivid illustration. They should also be studied by roving V.I.P.s as a model of how to avoid either offending one's host by lecturing him on his deficiencies, or boring him by mouthing vapid platitudes. Lord Justice Denning steers unerringly between these, the Scylla and Charybdis of the public speaker showing the flag abroad. In general, too, he is equally successful in steering between two other perils: that of fouling his own nest and that of painting too rosy a picture of it. The former is clearly the more objectionable and, in ensuring that he avoids it, it may be that he sometimes comes unduly close to the other danger. For example, it is not only ministerial inquiries that ignore the "elementary principle" that a judge must give reasons for his decisions (p. 29); as Mr. R. M. Jackson pointed out at Vol. 18, p. 572, of this *Review*, if this is an elementary principle it is one which is ignored in the majority of criminal trials in this country. Again it is surely an exaggeration to say that "it is unlikely that any juror who has read a newspaper report of the preliminary proceedings will remember sufficient to be influenced by it" (p. 67). In a sensational murder case (*e.g.*, the *Haigh* case which the learned author himself refers to at pp. 70–71) or other *causes célèbres* it seems to me to be in the highest degree unlikely that he will not remember it and be influenced by it however hard he may try not to be. Anyone who has attempted to persuade an American audience that their system of trial by newspaper is iniquitous (and this is what Lord Justice Denning was attempting though he expresses it more tactfully) will know that this is our Achilles heel, and my experience, at any rate, suggested that it is essential to admit it openly. And, finally, is it not a little misleading to suggest that "we have no system of promotion of judges in England" (p. 17)? Admittedly the system is very different from that prevailing on the Continent. And doubtless there have been judges who have refused to go to the Court of Appeal because they preferred trial work. But I find it difficult to believe that most High Court judges do not hope for translation to the Court of Appeal (even if the pay is the same) or to the House of Lords, and that they do not regard this as promotion. I suspect, too, that some county court judges nourish a faint hope of promotion to the Supreme Court—a few years back the hope was not so very faint. However, no one acquainted with Lord Justice Denning will suppose that he is unduly complacent about the present state of English law. In the final address, especially, he is highly critical of

the extent to which English lawyers have relaxed their vigilance in protecting freedom and in preventing its abuses. Happily the House of Lords in the much-debated *Bonsor* case have recently heeded his words in one of the areas to which he directs his attention.

Of particular interest, perhaps, especially to the audience to which it was delivered, is the address on the position of the legal practitioner, entitled "The Honest Lawyer." My only major criticism would be that the learned author, as is to be expected, thinks of the English legal profession as consisting primarily of the small fraction at the Bar. This is the angle from which most accounts of our organisation have been written, and it explains, I think, a number of misconceptions about us in countries like the States and Canada with a fused profession resembling the Solicitors' branch much more closely than the Bar. Nor would I altogether agree that "the greatest advantage of dividing the professions into two branches is that the number of barristers must then be comparatively small: and this is a great help in maintaining standards . . . ." (p. 63). I would respectfully suggest that it only helps to hide any falling off in standards and makes it easier for an unscrupulous solicitor or lay client to pull wool over the eyes of the Bench (there have been at least two conspicuous illustrations of this recently). And may it not, perhaps, be an over-simplification to say that a lawyer "must never suppress or distort the truth" (p. 39)? This statement must have been of particular interest to his audience, for Mr. Charles P. Curtis had recently shaken the American profession by suggesting in print that, on the contrary, it might sometimes be the duty of an advocate to do just that. If, argued Mr. Curtis, a lawyer seeking to reach a settlement were asked whether his offer was the highest he was authorised to make, it was his duty to say "yes," even if he in fact had authority to go higher. A mere refusal to answer, being tantamount to a negative reply, would not be consistent with his duty to his client. I wonder what Lord Justice Denning would say about this? And what about the rival solicitors each authorised to make the best settlement he can? Solicitor A telephones solicitor B and offers £500. B says his client demands £1,000. A says that he will take instructions. An hour later he phones B again and says his client will go up to £700. B says that he will take instructions, and an hour later rings back and says that £800 is his client's lowest figure. Ultimately they clinch the deal at £750. Neither A nor B has in fact referred to his client at all and both have suppressed and distorted the truth. But have they not behaved both normally and properly?

These reflections cannot give an adequate idea of the stimulation to be expected from a perusal of this book which can and should, be read with enjoyment by lawyers and laymen alike. The former will spot a misprint in the footnotes on p. 108 and lay purists may detect a Shakespearian misquotation on p. 5. Both will be given food for thought served in the most palatable form.

L. C. B. Gower.

Jurisprudence. By G. B. J. Hughes, m.a., ll.b. [London: Butterworth & Co. (Publishers) Ltd. 1955. xxx and 544 pp. 37s. 6d. net.]

Despite its vulnerability to minor criticisms this is a very good book indeed; certainly the best textbook on jurisprudence that has so far been published in England and it deserves to occupy first place on the recommended book lists of all our law schools. Mr. Hughes has a thorough grasp of his subject, an agreeable style, and is able to draw freely from his wide knowledge of subjects outside the law such as philosophy, sociology and history. In

addition he has a remarkable gift of lucid exposition, a quality displayed at its best in the chapters on "Legislation" and "Possession," the best condensed treatment of these topics that I have read. He is never dull and students will be stimulated to delve further into the subject aided by the excellent reading lists found at the end of every chapter.

In arranging his book the author has been on the whole conservative, following the normal English university classification of the subject into Legal Theory, Sources of Law, and Legal Concepts. He has, however, added an interesting novelty in the form of a short fourth section "Law and Society," a study of the law of industrial relations. It is regrettable, although understandable, that he did not break away from a classification of which he himself is highly critical. The topics grouped under "Sources of Law" belong properly not to jurisprudence but to a special first-year course explaining those subjects such as precedent and custom which students must grasp early in their career if they are really to understand the law. London University has recently recognised this by designing such a course "The English Legal System," but illogically has duplicated the students' work by leaving the topics in the jurisprudence syllabus. "A courageous approach by writers and publishers," remarks the author later in the book (p. 171). "is necessary for a revision of English ways of teaching law." Apparently on the question of arrangement his courage failed.

The author's treatment of legal theories is open to a number of criticisms. Any textbook writer is obviously working within rigid limits but some omissions, notably those of Jeremy Bentham and Dicey, are startling, while some subjects such as natural law are inadequately covered. Only a vague footnote draws the student's attention to the most burning of civil law controversies, namely, whether the tripartite division of Roman law into *jus civile*, *jus gentium* and *jus naturale* was Classical or Byzantine. One might have had a short epitome of Professor Levy's convincing arguments that while the Roman philosophers and publicists such as Cicero conceived natural law to be a body of rules superior to positive law, the classical jurists thought of it as a concept essentially inferior to positive law which did in certain circumstances give rise to legal consequences. On the Thomist view of natural law Mr. Hughes is actually misleading when he writes: "Natural law is now identified with the law of God which is revealed in the Old Testament and the New" (p. 34). This obliterates the vital distinction made by St. Thomas between natural law and revelation as essentially different means of apprehending the law of God, one based on reason, the other beyond it. Again he is superficial when he deals with modern natural law theories and offers no support for the extraordinary statement that Catholic thought "suffers from an unhappy approximation to the doctrines of Fascism" (p. 47). One suspects that Mr. Hughes has never read the social encyclicals "Immortale Dei" and "Christian Democracy" written by Leo XIII, while the unmerited sneer about "Rerum Novarum" on p. 47 ignores its date of composition (1891), which made it a revolutionary social document. He is also too sweeping in the claims he puts forward for Kelsen's theory of law as "the complete juristic answer to totalitarian theories of government" (p. 77). Whatever the merits of Kelsen's theory this is not one of them, since Kelsen ignores values, and so like Austin leaves law in the realm of force. Ultimately, Kelsen's "Grundnorm" is indistinguishable from Austin's "Sovereign" and both theories confer legal validity on the Communist and Nazi régimes as much as on the liberal State. Hitler's will in Nazi Germany certainly qualified as a "Grundnorm" in Kelsen's sense. His praise of Kelsen's theory of international law also appears extravagant, since Kelsen, far from logically justifying it, does little more than state his faith in ethical values, a declaration inconsistent with the rigid premises of his municipal law theory.

Until a third of the way through the book the author does preserve impartiality, but at p. 170 the mask is discarded and he is revealed as a

disciple of the Swedish realists: "The modern realist approach is the only one possible for us." I doubt it. If one accepts the central article of the realist creed—and it is too often forgotten that it is a creed—that values, especially moral ones, are non-transcendental, then perhaps Mr. Hughes is right, but if one rejects the technicians' philosophy, the realist approach, far from being "the only one possible," is unacceptable because it denies the fundamental realities. Even moderate "realism" must be rejected, since by ignoring as opposed to denying moral values it implicitly deprives them of importance. The moderates claim that they only divorce "is" and "ought" for purposes of methodology, but it is questionable whether the two concepts can be so easily separated. An "ought" believed in by a sufficient number of people becomes an "is," a metamorphosis which the realists ignore. The sociological approach is preferable because it escapes from the dilemma presented by "ought" and "is" by taking into account all social factors including the moral concepts generally accepted in a community. Both the realist and the teleological schools are incomplete, however, since they each reject an essential set of data.

Mr. Hughes has some illuminating things to say about law teaching, for so long the Cinderella of the academic world, still awaiting the advent of some fairy godmother to change the pumpkin into a coach and four with the wave of her wand. If academic law is still *declassé*, the fault is that of law teachers themselves and in their hands lies the remedy. "The whole method of teaching," writes the author, "becomes a recitation of cases and statutes, faintly emulating the thoroughness with which this necessary but plebeian duty is already fulfilled in those excellent works which in the legal world pass for textbooks. . . . Never is there a sustained attack on the social aspects of law, a sustained examination of what courts do as opposed to what appellate courts say: the whole sociological movement might never have taken place for all the impact it has had on law teaching in England" (p. 171). These are harsh words, but they strike one as being true. Reform must come from within and law teachers must occupy themselves more constructively than in bemoaning their lack of status in comparison with continental or American jurists who have hauled themselves up by their own boot straps.

What is the future of jurisprudence? Mr. Hughes is surely right when he says that it lies with the lawyer "who can bring to his study of the law an expert technique in some other branch of learning, particularly an expertness in economics, psychology or statistics. The great need is for studies of detailed sections of the law from the standpoint of these kindred sciences" (p. 170). Before this can come about there must be some radical rethinking about the scope and methods of law teaching. All who wish to see the law course changed from a technological discipline into a genuine form of liberal education will be grateful to the author for the valuable contribution he has made towards such a reassessment.

Norman St. John-Stevas.

The Communist Theory of Law. By Hans Kelsen. Published under the auspices of the London Institute of World Affairs. [London: Stevens & Sons, Ltd. 1955. viii and 203 pp. 25s. net.]

The application of so incisive a critical and analytical mind as Professor Kelsen's, with his uncompromising normative approach, to the Soviet doctrine or doctrines of law holds out the promise of a work of immense fascination and value to all students of jurisprudence. There must be quite a number of English readers who share this reviewer's ignorance and his desire for the enlightenment to be expected from what is described (by the publishers) as

"this first comprehensive study of the theory of law based on the 'materialistic' or economic interpretation of society inaugurated by Karl Marx."

It is perhaps too much to ask that the volume now before us might have maintained the studiously, indeed studiedly, objective tone set in this publishers' announcement. Professor Kelsen does in fact give an analysis of the teaching of certain Soviet leaders and legal writers from the revolution onwards, and shows up the tortuous efforts made to preserve the appearance of adhering to the latent ambiguity of Marx' and Engels' legal doctrines. He sees the fundamental flaw of Soviet studies in legal theory in the fact that "the very function of the Soviet doctrine of law is not to describe and explain social and especially legal reality in an objective way, but to form this reality by destroying an existing social order and replacing it by another, considered to be better."

After opening chapters devoted to the Marx-Engels and to Lenin's doctrines of state and law, *The Communist Theory of Law* discusses at some length the theories put forward by Stuchka (1921), Reisner, and Pashukanis (1924), and here, on the basis of quotations, Professor Kelsen insists on the great extent to which, in their attempt "to conform legal theory to the Marx-Engels prophecy of a stateless and lawless society of perfect communism" and to reject the findings of Western legal science, these Marxist jurists did in fact accept and reproduce "false" doctrines of current "bourgeois" jurisprudence. The situation was not essentially improved, Professor Kelsen holds, even after the break in the development of Soviet legal philosophy (around 1936–1937, marked by the rejection and eventual liquidation of Pashukanis) when the notion of incompatibility between law and socialism was abandoned. Discussing Vyshinsky's principles of legal theory in the light of an address he delivered at the First Congress on Problems of the Sciences of Soviet State and Law in Moscow in 1938, Professor Kelsen writes: "What is most amazing in this theory of the bolshevik Vyshinsky is that it is exactly of the same type as that bourgeois theory which the Soviet writers have derided and ridiculed more than any other theory: the natural-law doctrine which, just as Vyshinsky, rejects a mere theory of positive law because of its 'sterility and impotence' and which, precisely in accordance with Vyshinsky's recipe, works out, or pretends to work out, principles of law 'from life,' that is, from nature in general and from the nature of society or, what amounts to the same, from the social relationships in particular; with the only difference that these principles are the ideal norms of capitalist law. . . . But neither the one nor the other is 'correct and scientific.'"

Professor Kelsen proceeds to face Western or, as he insists on calling them, "bourgeois" champions of natural law as well as Vyshinsky with a restatement of his own Pure Theory of Law, and since he tends to argue until he has succeeded in reducing his opponents *ad absurdum*, it is difficult at times to avoid the impression that *The Communist Theory of Law* is a kind of *Streitschrift* which involves not only Soviet writers but lumps together with them all others "in the bourgeois camp" who disagree with him. Even as such, the book would probably be more convincing if the reader were not likely to feel somewhat uneasy about the author's approach and especially about the foundation on which his arguments are based. In the one chapter devoted to the Soviet theory of International Law, Professor Kelsen (who admits from the outset that he knows no Russian) can draw on a considerable amount of solid recent documentary material from Russian sources in French, German, and English, and these are supplemented and tested by reference to the files of the UN General Assembly and similar documents. No such wealth of material is at his disposal for an exposition of general Communist legal philosophy which makes up the major part of this book; in fact almost every single quotation from (and even reference to) post-Lenin writers on legal theory is taken from a single collection of translations published four years ago by Harvard University Press under the title *Soviet Legal Philosophy*.

The latest Russian treatise included in that volume appears to be a work by Golunsky and Strogovich published in Moscow in 1940, so that more recent developments and post-war trends of ideas are not reflected in Prof. Kelsen's book except in one or two footnotes. Since the author has seen at best only part of one or two works by the few "representative" Soviet writers whom he discusses, while the contribution and opinions of all others, including many of such importance as Bukharin and Krylenko, seem to be wholly unknown to him, it is not quite easy to be as free of apprehension as Professor Kelsen himself that he has not "missed any essential feature of their doctrines."

What is certain is that no coherent picture of Soviet legal theory ever emerges from this book. To a great extent this is of course inherent in the matter at hand: it has obviously proved exceedingly difficult, if not impossible, for Communist lawyers to establish an adequately satisfactory theory of law either on the basis of orthodox Marxian teaching or even outside it, not to speak of one whose logic could not easily be demolished by an eminent thinker like Professor Kelsen. But here one cannot help feeling that the pleasure of the hunt has been almost too much for Professor Kelsen. No doubt he is justified up to the hilt in saying, in his concluding sentence: "The deplorable status of Soviet legal theory, degraded to a handmaid of the Soviet Government, should be a grim warning to social scientists that true social science is possible only under the condition that it is independent of politics." That is the one thing most of us have always known. The trouble is that Professor Kelsen has so rushed to his conclusions and has made such mince of the "small fry" to which he has applied himself and his method that in the end there is nothing left of Soviet legal science. And rightly or wrongly that is what one was looking for in his book: a normative interpretation of a most important social phenomenon.

H. A. Hammelmann.

The South African Law of Husband and Wife. With an Appendix containing the Matrimonial Affairs Act, 1953, and a Commentary thereon. By H. R. Hahlo, ll.b., Dr.Jur. Advocate of the Supreme Court of South Africa, Professor of Law in the University of the Witwatersrand, Johannesburg. [Cape Town and Johannesburg: Juta & Co. Ltd. 1953. lxiii and 521 pp. £4 1s. 6d.]

The South African law relating to domestic affairs is undoubtedly one of the most difficult laws of its kind on the entire globe. Its basis is, of course, the old Roman-Dutch law, which in itself is already of no mean difficulty being a strange mixture of *usus modernus* and Dutch statutory enactments from the sixteenth to the eighteenth century, a few of which continue to remain in force. This complex system became even more complex in consequence of the interpretation put upon it by courts which applied to it common law methods of interpretation and ideas imported from England, including, in effect, the practice of *stare decisis*. Further complications resulted from modern legislation, first on the pre-union and then on the union level. Union legislation has not resulted in unification. Considerable differences between the various parts of the union continue to exist. The union legislation on its part, however, distinguishes again between European and Native matrimonial relations and has thus introduced fresh complexities. It is no mean merit of Professor Hahlo's work to have provided a safe guide through the tangle of the many pitfalls besetting any student in this field of law and in particular the student or practitioner outside the Union of South Africa. The author has greatly added to the usefulness of his work by a number of features which put his work well above the level of the ordinary practitioners'

handbook. Thus he has included throughout his work full statements of the law of Southern Rhodesia. He has added numerous references to English law, including in particular recent cases in this field. These will facilitate orientation, not only for South African readers, but also for users of his work in this country. He has discussed a considerable number of questions on which there is not yet any judicial authority. He has reprinted relevant passages from the old Dutch legislation. He refers constantly to learned contributions in legal periodicals and in monographs, both in this country and the Union. And—last not least—the book contains a full and lucid dissertation on the South African law relating to the conflict of laws in its field, contributed jointly by the author and Mr. Ellison Kahn, which will be particularly welcomed by readers outside the Union, because there is no recent textbook on the South African law of conflict of laws in general and because the authors have wisely included a detailed statement of the law relating to the enforcement and recognition of foreign judgments in the Union. What has been said will suffice to show that the work is indispensable to any practitioner in the field of the law of husband and wife who has to deal with any problem relating to the Union or to Southern Rhodesia.

The law of South Africa has, of course, a great deal of attraction for the academic student of comparative law. It is one of the systems which are said to stand between the common and the civil law. Professor Hahlo's work is evidence of the fact that—in the field covered by this book at least—South African law has moved far more strongly towards the orbit of the common law in recent years. The amount of reverence shown to judicial decisions is clear evidence of the extent of this development. Professor Hahlo quotes verbatim numerous sayings of judges—no doubt for the benefit of his readers —which are neither particularly striking by their originality or depth of thought nor by their beauty of diction. His own original contributions to the development of the law, which are by no means few in numbers, are set out with the humility of style which is *de rigueur* in common law systems, but would be considered to be entirely out of place by a civilian legal writer. They are throughout confined to minor points and nearly all relate to questions on which there is little or no judicial authority: there is, it seems, none of that glorious freedom left which enables a civilian to question even long-established judicial usage in the interest of justice and the improvement of the law.

A more serious drawback from the student's point of view is that Professor Hahlo does not say anything on the social and economic background of the legal rules with which his book deals. The historical explanations constitute the least satisfactory part of the work. This is in particular true of the first nine pages which attempt to sum up a development of some 2,000 years. But it is also true of other chapters dealing with the "old law." Informative as most of these chapters no doubt are, they would clearly gain enormously in value by the addition of some factual information showing the struggles which gave birth to the new legal rules, and describing the forces which won and which were defeated and the moral or economical or political reasons which resulted in the many changes through which this branch of South African law has passed in its tortuous history. Professor Hahlo's ambition was to write a book useful alike to student and practitioner. As it is, his work will certainly satisfy the needs of the latter, but not entirely those of the former. Professor Gower's *Company Law* has shown how much factual information, which aids proper appreciation, can be given even in a book of medium size.

There is another aspect of this work which will strike many readers. The law of South Africa has recently been referred to as an example of a legal system in which a process of perversion has set in in consequence of the unbalancing tendencies of racialist ideas (see F. von Hippel, *Die Perversion von Rechtsordnungen*, (1955) pp. 18 *et seq.*). The Union Prohibition of Mixed Marriages Act, 1949, (No. 55 of 1949) has certainly a painful similarity to the infamous Nuremberg laws of 1935. The similarity extends even to the

attempt to invalidate certain marriages concluded outside the Union of South Africa. Professor Hahlo gives a clear and full description of this enactment with reference to decided cases. But he utters no single word of criticism. Perhaps the perversion has reached a stage at which the learned author is entitled to claim the benefit of the defence "impossibilium nemo obligatur." It is significant that this fairly large work refers—according to its index—only three time to Natives and only twice to Indians. We learn of the fact that there are Native courts which have jurisdiction to determine suits for nullity, divorce and separation between Natives. Their jurisdiction is concurrent with that of the Supreme Court. But we hear nothing of their practice or their social functions within the framework of the law. Professor von Hippel says that the South African Natives have been degraded to the rank of undesirable aliens in their own country. The unfortunate impression which Professor Hahlo's clear and objective statement of one of the most important parts of South African law will leave on readers outside the Union is that there seems to be a very great deal of truth in this saying.

E. J. Cohn.

A Common Lawyer Looks at the Civil Law. By F. H. Lawson. [Michigan University Press: London: Geoffrey Cumberlege. 1953. xvii and 216 pp. 32s. net.]

Judged by any standards this is a book of outstanding quality in the best tradition of the older law classics and capable of satisfying a variety of interests. It consists of five lectures delivered at the University of Michigan. There is a foreword by Professor Yntema. The plea of both Professor Yntema and Professor Lawson has always been that the study of Roman law is an excellent starting-point for the study of Civil law and therefore of Comparative law. In this book the author examines carefully not only the extent of the contribution of Roman law to modern civil systems but also the non-Roman elements in them. A chapter on the "advance beyond Roman law" shows the points of departure from the Roman practitioner's outlook into the abstractions and generalisations of modern lawyers. Following David and Rabel, Professor Lawson stresses the similarities and the differences between the civil law and the common law. One of the chief merits of the book is its moderation. The author has not used rose-coloured glasses. Even the most prejudiced common law bigot may have to yield to his persuasion. There are many epigrams and occasionally a glint of puckish humour. The reader will be kept wide awake by a rapid succession of penetrating thrusts. The book could serve as an introduction to Roman law, certainly to Civil law and Comparative law; but it is also a lively early exercise for the beginner in Jurisprudence.

Raphael Powell.

A Bibliography on Foreign and Comparative Law Books and Articles in English. Compiled and annotated by Charles Szladits, ll.m. (London) Dr.Jur. (Budapest). [Parker School of Foreign and Comparative Law, Columbia University in the City of New York. Distributed by Oceana Publications, New York 11. xx and 506 pp. $15.]

The publication of this volume is an event of great importance for all those who are engaged in comparative legal research. Its aim is to list "all books

and articles in the English language dealing with non-common law legal systems and with general subjects bearing upon the comparative study of law." Many users of this bibliography will be surprised at the extent of the literature in this field. The bibliography contains no less than 13,742 entries, and although a not inconsiderable number of these are duplicates or triplicates, *i.e.*, entries repeated in various sections of the work, the total number of books and articles listed cannot be less than 10,000. Dr. Szladits has performed a gigantic task and has performed it supremely well. One is torn between admiration for his comprehensive knowledge and immense assiduity on the one side and envy for his opportunities on the other, because, as he points out in the Introduction, the work "is composed largely of materials available in the Law Library of Columbia University."

Dr. Szladits has cast his net very wide, and this in the sense that he aimed at including all books and articles in the English language on any legal system in the world with the exception of English law and the common law systems of the British Commonwealth and the United States, and also in the sense that he attempted to cover subjects such as conflict of laws, the unification of law, legal education, and considerable portions of "jurisprudence" which impinge upon the comparative study of law. The work is divided into ten parts, the first of which comprises "comparative law and related subjects in general" and contains, *inter alia*, works about the comparative method, about codification and unification, periodicals, serial publications, dictionaries, encyclopedias, etc. The second or "General" Part lists works on the theory or character of foreign laws, historical and jurisprudential aspects, works on sources of law, translations of codes and other laws, and kindred matters. In the third Part books and articles on "Private Law" are collected, subdivided into general notions and the law of persons, law of obligations, law of property, law of succession, and family law, *i.e.*, very much in the order of one of the modern Continental codes. "Commercial law" which is covered in Part Four includes not only business organisations, maritime law, commercial paper, banking and stock exchange, insurance, "communication" (an omnibus term comprising carriage as well as broadcasting, post, telegraph and telephone) and warehousing, but also cartels, combinations and monopolies, unfair competition, industrial property and copyright, and bankruptcy and insolvency. "Labour law" in Part Five bears the restricted meaning it has in American academic education, *i.e.*, it covers collective labour law only and neither the contract of employment (which appears in "private law") nor social services (which appear in "administrative law"). Parts Six, Seven and Eight deal with Procedure (*i.e.*, judicial organisation and civil procedure as well as arbitration), criminal law, and criminal procedure, Part Nine with Public Law, which comprises constitutional, administrative, and financial law, and the last Part is a very excellent bibliography on the conflict of laws.

The arrangement is good and makes it easy for the research worker to get his references almost at a glance. There is a Geographic Index and an Index of Authors, and there are plenty of cross-references which are of special importance in a work of this kind. The reviewer has made a number of tests and found that the material with which he happened to be familiar was, almost completely, covered by the work. Dr. Szladits deserves a vote of thanks for having taken a heavy burden off the shoulders of all comparative lawyers. No work in this field will in future be possible without previous reference to this bibliography. One can only express a pious hope that some publisher may have the good sense to make it available in this country at a price more within reach of ordinary mortals than that at which it is now sold in the United States.

O. Kahn-Freund.

PROFIT-SHARING IN PRACTICE AND LAW. By JOHN C. HARPER, LL.B. (London), of the Inner Temple and Lincoln's Inn, Barrister-at-Law, Sometime Associate of the Institute of Chartered Accountants in England and Wales. [London: Sweet & Maxwell, Ltd. 1955. xxiv and 357 and (index) 10 pp. 38s. 6d. net.]

THE scope of Mr. Harper's book is wider than one might think from its title and from his definitions of profit-sharing and co-partnership. He tells us at pp. 5–6 that profit-sharing must be distinguished from co-partnership, since the latter involves participation by employees not only in profits but also to some extent in management, but nevertheless about a third of his book is concerned with capital schemes. The inclusion of capital schemes in Mr. Harper's book was, however, inevitable, for a company may well have a composite scheme, combining both a profits scheme and a capital scheme.

Profit-sharing and co-partnership schemes may take many different forms. They may take the form of a profit scheme, under which a defined percentage of the periodical profit is divided in a defined manner among those participating in the scheme, or of a distribution scheme, by which participants receive a bonus varying in accordance with the distribution made to the company's shareholders or some class of them, or of a capital scheme, under which the employees' interest in the company's capital has been acquired on specially favourable terms and as part of a system. As regards capital schemes, Mr. Harper makes a threefold classification of them into (1) "bonus register schemes," under which a special register of shareholders is kept for employee shareholders and a bonus dividend is paid on the shares entered thereon in addition to the normal dividend paid to all shareholders of that class; (2) "employees' share schemes," which involve the issue of one or more special classes of shares on specially favourable terms to employees only; and (3) "share purchase schemes," under which a company provides financial assistance to employees to acquire an interest in its capital.

The book succeeds admirably in its primary purpose of providing for business men information as to these various types of schemes, the difficulties to which they respectively may give rise, and the ways in which those difficulties may be overcome. Mr. Harper is concerned not merely with an exposition of the relevant legal rules but also emphasises those practical matters which it is necessary to bear in mind if the confidence of the employees (an essential pre-requisite to the success of a scheme) is to be obtained.

Apart from a slip on pp. 103–104, where a company's net profit for a year is equated with the balance of that year's profit and loss account carried forward, the book reaches a very high standard of accuracy and can be recommended with confidence as a reliable source of information. Written, as it is, primarily for the layman, the exposition of the law has been kept as simple as possible; nevertheless, those lawyers (the number of whom must be very large), who have had little practical experience of the problems raised by such schemes, can learn much from the book and will appreciate its readability, whilst all lawyers, whether already familiar or not with such problems, will find the numerous forms and precedents contained both in the text and in the appendices very helpful indeed.

The author and publishers are to be congratulated on their enterprise in bringing out this volume at a time when there has been so marked a revival of interest in the possibilities of industrial co-partnership.

J. A. HORNBY.

Byles on Bills of Exchange. Twenty-first Edition. By Maurice Megrah, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1955. lxxvii and 439 pp. (with index). £3 3s. 0d. net.]

A new edition of this, the classical texbook, on the law of bills of exchange, promissory notes and cheques is very welcome. As the editor says in his preface the gap of sixteen years which separates it from the last edition is the longest in the history of the work: during the last century new editions used to appear about every five years, a good indication of the importance of this branch of the law during that period.

As this is the first occasion on which Byles has been reviewed in this periodical it is perhaps fitting to make some general observations about its scope and character. Originally published in 1829 it is the only survivor of several competent early textbooks on the subject and its survival undoubtedly reflects the respect in which it is held in the profession. This is partly due to the fact that its author was probably the greatest master of his subject who has ever practised in this country, and partly due to the fact that it contains valuable chapters on important matters such as the effect of the bankruptcy statutes and the statutes of limitation on bills of exchange which are naturally absent from its principal rival, Chalmers, where those subjects are dealt with here and there incidentally to the consideration of the text of the Bills of Exchange Act, 1882, on which it is, of course, a commentary.

Byles, who became a competent though not outstanding judge of the Common Pleas, continued in charge of the work for nearly forty years, the period when the use of bills of exchange in commerce was at its height, so that his knowledge and experience of his subject have probably never been equalled, and his statements on the law still carry much the same weight as judicial pronouncements.

With the passing of the Bills of Exchange Act, 1882, the character of the work altered somewhat, and became more in the nature of a commentary on the code. But the material of the individual chapters was arranged ingeniously round the sections of the statute, and it thus provides a rather more readable text than the rather arid notes attached to the sections of the Act in Chalmers. More important it has enabled the later editors to maintain a reasonably homogeneous treatment of the various aspects of the subject. This is not only true of the somewhat peripheral topics already mentioned such as bankruptcy, but of the more basic ones such as cheques. In order to discover the law of cheques from the statute a good deal of backwards and forwards reading is necessary, and it is not at all easy to get a general picture. In Byles all the relevant sections are brought together in one chapter, and are there treated in a logical order, which is a great help to the reader. This does of course lead to a certain amount of repetition, since some of the sections in question are relevant to bills of exchange proper, and have again to be discussed in the appropriate place. Most readers will willingly forgive this, however, in consideration of the added comprehensiveness and clarity which are thereby attained.

There is nevertheless at least one topic which is dealt with in different parts of the book without adequate cross-referencing; that is the important subject of the effect of payment of a debt by bill of exchange. This is discussed under cheques (p. 24), in the special chapter on "bill or note as payment," and at p. 245, and the statements made are not always easy to reconcile. The previous edition contained the rather bald and possibly misleading statement that "a cheque, unless dishonoured, is payment." To this Mr. Megrah on the strength of *Re Hone* (*infra*) has added the words "when it is cleared," though actually Harman J. who so found in that case limited his finding to bankruptcy cases. It is submitted that the true effect of taking a cheque or other bill is that the payment is conditional on the cheque being honoured, which is perhaps implicit

in the statement in the earlier edition, and appears more fully at p. 245 of the new edition.

Coming to the present edition one's first word must be one of congratulation to the publishers on having induced Mr. Megrah to undertake the work of editor. As secretary for many years to the Institute of Bankers, where the Bills of Exchange Act had its origin, he has been able to acquire an exceptional knowledge of the commercial aspects of the law, and as the author of a successful commentary on the statute he has already established his reputation as a textbook writer. It is a pity that in taking over responsibility for Byles he has contented himself to such a large extent with what he calls "bringing the work up to date in the normal sense." It is true that by the introduction of paragraph headings in heavy type, by spacing the text, and by other means he has much improved the appearance of the work. He has also put much research into the discovery and citation of relevant Dominions and American authorities which often throw light on problems raised by our own statute. Again it is helpful, especially to those who have to advise Continental clients, to have in an appendix a comparative table of our code and the sections of the Geneva Convention on the Uniform Negotiable Instruments Law: indeed it would have been useful to have the text of the latter as well. And of course the work of bringing in the new cases and statutes has been done with the thoroughness which we have learned to expect from Mr. Megrah.

But there have during the past fifteen years or so been an unusually large number of decisions which have given rise to controversy, sometimes almost heated in character, and it seems a pity that Mr. Megrah has not given the profession the benefit of his views on the problems involved, in the way that Sir John Paget used to do on similar occasions. To mention but a few of these cases we have *Brewer* v. *Westminster Bank* [1952] 2 All E.R. 650; *Bute (Marquess of)* v. *Barclays Bank* [1954] 3 W.L.R. 741; *Coutts* v. *Browne-Lecky* [1946] 2 All E.R. 207; *Motor Traders Guarantee Corporation* v. *Midland Bank*, 54 T.L.R. 10; *Re Hone* [1950] 2 All E.R. 716; *Oliver* v. *Davis* [1949] 2 K.B. 727; *Bank of Baroda* v. *Punjab National Bank* [1944] A.C. 176. Most, if not all, of these cases have been the subject of notes or articles in the legal periodicals, some of which, indeed not the least useful of them, have been from the pen of Mr. Megrah himself. It is disappointing that in Byles he should have been content to note them up in appropriate places, and even to ignore the *Browne-Lecky* case altogether, presumably on the ground that being primarily concerned with guarantee it is not directly relevant. The only exception to this unfortunate self-restraint which I have noticed is the telling criticism of the recent judgment of Devlin J. in *Kwei Tek Chao* v. *British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 which appears on p. 305. He might have added that the learned judge's distinction between altering the date on a cheque and altering the sum for which it is drawn is equally unfortunate, since section 64 treats alterations of the sum payable and the date of drawing as being exactly on a par with each other.

Rather fuller discussion of the basically important subject of negligence in connection with the collection of crossed cheques would also be desirable. An important aspect of this problem relates to the amount of care which a banker must take to satisfy himself as to the respectability of a new customer. This receives attention in only part of one paragraph in Byles and the citation of the relevant cases is far from complete. Again the subject of countermand of cheques requires rather more attention—the effect of the leading case of *Curtice* v. *London City and Midland Bank* [1908] 1 K.B. 293 is not accurately stated. Then *Oliver* v. *Davis* (*supra*) contains an important if not very convincing statement by Evershed M.R. as to the meaning of "antecedent debt or liability" as consideration for a bill, in which he equates the meaning of this rather ambiguous phrase with past consideration, and this view certainly ought to be noticed.

C.

Internationale Rechtsprechung zum Genfer Einheitlichen Wechsel- und Scheckrecht. Herausgegeben von Professor Dr. Ernst von Caemmerer, bearbeitet von Dr. Malte von Bargen, unter Mitarbeit von Dr. Gunther Späth. [Berlin: Walter de Gruyter & Co. and Tübingen: J. C. B. Mohr (Paul Siebeck). 1954. xx and 499 and (index) 28 pp. DM. 51.]

This is a work of considerable industry and importance produced under the auspices of the Max-Planck-Institute for Foreign and International Private Law at Tübingen.

Over twenty years have passed since the International Conferences at Geneva which led to the drafting of the Geneva Uniform Law of Bills and Notes in 1930 and of the Geneva Uniform Law of Cheques in 1931, and this book consists of an examination of how these laws have operated in ten of the participating countries which have adopted them—Denmark, Germany, France, Italy, the Netherlands, Norway, Austria, Portugal, Sweden, and Switzerland.

The book is divided into two parts, the first dealing with Bills and Notes, the second with Cheques, and each part observes the same pattern. There is first an introductory chapter which describes in detail the extent to which the Uniform Law has been incorporated into the national laws of the ten countries under review, and this is followed by a comparative table showing the number of each Article of the Uniform Law with the number of the corresponding Article in each of the individual national laws.

In the main section of each part the text of each Article of the Uniform Law is given in the official German translation, and in the official French and English versions, and these texts are followed by a number of propositions based on decisions given by the courts of the various countries on the interpretation and application of the corresponding Article in the national Code. Sometimes only a reference to the case is given, on which the proposition is based; sometimes we are given a brief summary of the facts and reasoning of the decision in order to support or elucidate the proposition; occasionally a note is interpolated to give a cross-reference or to underline a particular point or aspect of a decision.

In this manner each of the seventy-eight Articles of the Uniform Law of Bills and Notes is dealt with, and, in the second part, each of the fifty-seven Articles of the Uniform Law of Cheques; and this accumulation and collation of case-law from ten countries must inevitably make this work of the greatest value to anyone interested in a comparative study of this branch of the law, and indeed to any jurist who wishes to see how international uniformity of legislation can be either perfected or destroyed by national judicial interpretation.

Great Britain has not adopted either of the Uniform Laws, and so no decisions are cited from the English or Scottish courts, nor are they even referred to by way of comparison or contrast. Indeed any such comparison or contrast is beyond the intention and scope of this book which is solely and essentially a collection of material on the operation of the Uniform Laws.

But the English lawyer will find this work invaluable as a reference book from which to gain some insight into the operation of the Continental law, and from which he can make his own comparisons and contrasts. Thus there is an apparent divergence as to the fundamental nature of the obligation on a bill or cheque under the Uniform Law on the one hand and the Anglo-American system on the other. The latter system has always regarded that obligation as merely one species of contractual obligation, although the severe modifications of general principles of Contract in their application to bills and cheques sometimes reduce this conception to a fiction; on the Continent the obligation is regarded as *sui generis*, arising from the very nature and form of the instrument—hence the importance attached there to the formalities.

From these contrasting attitudes stem many consequential differences,

including perhaps the difference in the legal consequences of a forged indorsement. In the Anglo-American law negotiability has always been deprived of its full effect by the rule that even negotiation cannot confer a good title after a forged indorsement; under the Continental system it can, with much greater logic.

But such points of contrast should not be allowed to obscure the fact that there is a great deal of common ground in the Uniform Law and in the Anglo-American laws, as the late Professor Gutteridge was wont to emphasise, and this indeed is inevitable since both systems of law must, as a first and indispensable requirement, operate effectively against broadly the same commercial background. And the English lawyer who consults this work will realise that, in spite of the many ostensible divergences between the two systems, in practice the provisions of the two systems are often made to produce surprisingly similar results.

C. F. Parker.

Bahrein Islands. By Fereydoun Adamiyat. [New York: Frederick A. Praeger, Inc. London: Stevens & Sons, Ltd. 1955. x and 268 pp. 37s. 6d.]

Dr. Adamiyat is well known both as an historian and as a lawyer. He is the author of "The Diplomatic Relations of Persia with Britain, Russia and Turkey: 1815–1830" and of a three-volume work on the life and foreign policy of the Persian statesman Amir Kabir. He has also been Iranian representative on the United Nations Special Committee on the Definition of Aggression and rapporteur of the Legal Committee of the General Assembly.

This book is described as "A Legal and Diplomatic Study of the British-Iranian Controversy"—the controversy, that is to say, over the sovereignty over Bahrein. Iran claims that Bahrein belongs to Iran, whereas the United Kingdom maintains that the Sheikh of Bahrein entered "as an independent ruler" into special treaty relations with the United Kingdom. These relations are of the general nature of a protectorate, the governing instrument being the Bahrein Order in Council of 1913. The subject-matter of the book is therefore well suited to Dr. Adamiyat's gifts, although it often happens that the roles of historian and advocate are not easy to combine. This is certainly the case here, and the result is a work of most uneven quality.

When he is writing as an historian, Dr. Adamiyat shows real historical insight in divining the motives behind the policies of the various Powers. In particular, quoting extensively from British sources, he shows the differences of view which often existed between British officials in the Persian Gulf, the Government of Bombay, the Government of India, the India Office and the Foreign Office. Similarly, on the Persian side, there were differences between the authorities of the central government in Teheran and the provincial authorities in Shiraz. In no sense is the historical account spoiled by anti-British bias. Indeed it would have been of genuine interest to British readers if Dr. Adamiyat had let us know a little more of what he really had in mind when he referred to a certain Governor of Bombay as a "typical intellectually mediocre British civil servant." One criticism, however, that might be made of the historical chapters is that, having regard to the complex story of the Persian Gulf, it is hardly practical to single out for special treatment the relatively small matter of the British-Iranian controversy over Bahrein. But presumably this decision was dictated to Dr. Adamiyat, not by his historical sense, but his desire to write a book that could be used to support Iran's claim.

So far as Dr. Adamiyat's legal arguments are concerned, it is not the task of the reviewer to judge whether they are good or bad, still less to attempt to refute them. It is, however, legitimate for the reviewer to comment upon the manner in which Dr. Adamiyat handles legal material. This can only be

described as defective, and inferior to the work of Majid Khadduri who, in Volume 45 of the *American Journal of International Law* (at p. 631), published an article on the Bahrein question the object of which appeared to be to reserve a general Arab claim to Bahrein in the event of the Sheikh's ties with the United Kingdom being dissolved. Instead of studying the rules of international law relating to the acquisition and loss of territory, as laid down by international tribunals in a number of leading cases, and then applying these rules to the Bahrein case, Dr. Adamiyat seems to start from the proposition that "a territory belonging to a sovereign State cannot be lawfully detached, so long as the right of ownership has not been transferred by this State to another in virtue of an official act, in this case a treaty, or so long as its annexation by another State or its independence has not been officially recognised by the lawful owner of the territory." This proposition was put forward by the Iranian Government in diplomatic notes in 1927–1928. It does not appear to be supported by any authority and it is not difficult to understand why the United Kingdom Government characterised it as a principle which, if it existed, would "seriously prejudice the maintenance of peace and international order." Dr. Adamiyat also attaches importance to the fact that the Sheikh's relations were originally with the East India Company and not with the United Kingdom, but this does not prevent him, where convenient, from relying on the acts of the Company's officials. As a final example of Dr. Adamiyat's method, he cites Judge Huber in the *Island of Palmas* case to the effect that treaties between the Dutch East India Company and native princes were "not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties." But he omits to add that Judge Huber went on to say that "contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which the law must in certain circumstances take account."

The book contains a useful bibliography and—consistently with its general purpose—a number of documents alleged to support the Iranian case published as appendices, but unfortunately no index.

D. H. N. Johnson.

Völkerrechtliche und staatsrechtliche Abhandlungen. Carl Bilfinger zum 75. Geburtstage am 21. Januar 1954 gwidmet von Mitgliedern und Freunden des Instituts. Max Planck-Institut für Ausländisches Oeffentliches Recht und Völkerrecht, Heidelberg. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Heft 29. [Berlin: Carl Heymanns Verlag KG, Köln. 1954. viii and 557 pp. DM. 47.]

This *Festschrift* deserves the closest attention, not so much on account of the number and quality of the various essays of which it consists, but because of the person and teachings of the scholar whom it is intended to honour. Carl Bilfinger came into prominence in 1932 when he appeared as counsel and legal adviser to Franz von Papen in connection with the latter's famous *coup d'état* which destroyed the Weimar Republic. He was promoted to the chair of international law at Heidelberg University a short while after Nazism had come to power. In 1944, when Himmler and his SS. were the true rulers of Germany, Bilfinger became the successor to Bruns in the directorship of the influential Kaiser Wilhelm Institut für ausländisches und internationales Privatrecht in Berlin. He remained in that post after 1945. This Institute—now renamed Max Planck Institut and transferred to Heidelberg— is responsible for the publication of the present volume.

Unfortunately, and contrary to general usage, the learned editors have

omitted to include in this volume a list of Professor Bilfinger's very numerous writings, many of which are of considerable interest to those who wish to understand the motives and methods of a group of German scholars of international law, which was of fateful importance during the last thirty years. It is of some interest to look a little more closely at some of these writings. Among Professor Bilfinger's more noteworthy works is one entitled "The true face of the Kellogg-Pact.—Anglo-Saxon Imperialism under cover of law" (Haka-Druck Berlin O.17, year of publication not stated). The following quotation from this work, which seems to have been published in 1941 or 1942, illustrates the sort of doctrine which Professor Bilfinger has taught at his various German University posts:—

> ". . . The war, declared by England and her satellites upon Germany, has the character of an armed intervention which had broken out between Germany and Poland, which latter had been incited by England. . . . English politicians knew perfectly well that by this war England would commit an act which is unlawful under the law of the League of Nations. England, the chief profiteer, the watchman and the responsible guardian of international law, undertook to violate the charter of the League of Nations in the face of the negative or hesitant attitude of its neutral members—an embarrassing position in view of the pretence, maintained by British propaganda, that England would conduct lawful wars only. Whichever way one were to turn and twist the charter of the League of Nations there clearly could not be any convincing justification for the violation of the charter committed by the declaration of war against Germany. England had thus caught herself in the meshes of the net which had been meant to fetter Germany, parts of which were the war-guilt-lie and the punishment of the 'aggressor'."

The learned author arrives at the conclusion that the Kellogg Pact is nothing but

> "an instrument of gross fraud in the service of Anglo-Saxon power politics, a worthy counter-part of the League of Geneva" (*loc. cit.*, p. 39).

In his pamphlet on "The Stimson doctrine" (Essener Verlagsanstalt, 1943) our celebrated scholar informs his readers (at pp. 32 *et seq.*) that

> "the Government of F. Roosevelt by completing the U.S.A.'s abandonment of their isolationist post-war-policy in Europe undertook to lead the crafty propaganda of World Jewry against German National Socialism."

In another work, which bears the significant title "The League of Nations as Instrument of British Power Politics" (Junker & Dünhaupt Verlag, Berlin, 1940) he explains that

> "since 1938 England has tried to put into effect a scheme of encirclement"

against Germany (at p. 24) and says that

> "the Führer has torn up this net of fraud against the law, he has broken down the British monopoly of international law and uncovered the true face of the British 'league of nations'."

In an article published in the *Journal of the Academy for German Law*, 1941, at p. 255, Professor Bilfinger wrote that the modern science of international law had definitely rejected both the doctrine of the just and unjust war and the entire train of thought according to which aggression was legally forbidden and defence permitted. Such a doctrine was incompatible with the principle of the independence of States. This incompatibility was the basis on which the science of international law had to make its contribution to the intellectual fight against those who had started this war, *viz.*, Great Britain. Perhaps even more significant is an article published by him two years later in the same periodical (1943, p. 17) headed "On the tenth anniversary of the Revolution." Writing *in majorem gloriam* of the Nazi revolution, the learned author points out that it is the

> "task of the hour to secure by armed power the constructional work of the last ten years within the framework of the German New Order for Europe."

and he dutifully describes President Roosevelt as a "war-monger."

Professor Georg Schreiber and Professor Hermann Mosler (the latter of whom succeeded Bilfinger as head of the Institute), the editors of the present *Festschrift*, say that it is Bilfinger's merit, "that—notwithstanding the German collapse (*i.e.*, of 1945)—the atmosphere of practical humanism has been maintained, which was created by Viktor Bruns . . ." One must seriously ask what the meaning of these words can be if applied to one of the scientific propagandists of the legal theory which supported concentration camps and gas chambers. Was the genocide, committed by the German New Order for Europe, "practical humanism"? Was it "practical humanism" to teach that the Kellogg Pact was sheer hypocrisy and that the differentiation between just and unjust wars was incompatible with State sovereignty? Can one really pretend that the learned author, who was honoured by the editors of, and contributors to, this *Festschrift*, was not an active adherent to, and a blind supporter of, the Nazi system of blood and terror, a system to whose leading representatives he owes what the learned editors call "a brilliant academic career, crowned by the directorship of the Institute"?

That, in 1954, a *Festschift* in honour of a Carl Bilfinger could be published by an Institute largely financed by the German Federal Government is, in my submission, a fact of which legal scholars everywhere should take due note. This fact is far more important than are the merits or demerits of the individual contributions to it, though one or two of them are clearly of the same flesh and blood as the writings of the scholars in whose honour they were written and published. Thus, to mention one example only, Professor Erich Kaufmann, writing on the jurisdiction of the Allied war crime tribunals and the Control Council, puts the word "war criminal" into inverted commas on every single occasion when he is using it. The judgments against the Spandau prisoners, such as Hess, Neurath, etc., are described by him as a "tragic event" (at p. 144). Does the learned writer consider these convicts as "practical humanists" in the Schreiber-Mosler meaning of the word?

Among the numerous other contributions there are some which are of considerable value. Dr. Féaux de la Croix's article on the London Debt Agreement is of interest to non-German readers. So are Dr. Kraske's essay on the Bricker Amendment and Professor Scheuner's careful and balanced investigation of the position of non-members of UNO. Dr. G. Weiss contributes a clear and objective explanation of the international position of Jerusalem. Other articles, such as those by Professor Schüle and Dr. Partsch, deal with important practical questions of German public law. Professor Wegner in an interesting—though in many respects curious and entirely unconvincing—article maintains that Prussianism has a distinctly Christian character. Dr. von Puttkammer describes the history of European constitutional schemes. Dr. von Merkatz, a member of the Bonn Parliament, contributes a remarkable thesis on the relationship between E.D.C. and the European Steel and Coal Federation. The very high quality of some of these articles—and of others to which to refer in the context of this review would lead too far—speaks for itself. The influential positions, held by their authors, make the fact appear to be significant, that they were published on this occasion. That German jurists of great repute, some of whom profess to be devout Christians, and some of whom are well known to have been victims of Nazism, thought it advisable to band together in 1954 for the purpose of honouring an outstanding protagonist of Nazi legal theory, must be considered to be an ominous danger sign for the future intellectual and moral development of Germany. One may wish to forgive those who, for some reason or other, have for years actively assisted a régime of cruel terror and unprecedented crime, whose responsibility for World War II no sane person can doubt. But is it morally right—or is it even merely politically tactful—to honour and to praise the representatives of the Nazi legal theory as "practical humanists"?

E. J. Cohn.

BUYING AND SELLING A HOUSE. Second Edition. By M. BASIL EVANS, M.B.G., F.R.I.C.S., F.A.I., M.INST.R.A. [London: Stevens & Sons, Ltd. 1955. viii and 165 pp. and index. 10s. 6d.]

THIS book admirably achieves its object of providing the layman "with some idea of the difficulties to be encountered and the pitfalls to be avoided in the buying and selling of a house" (Preface, p. 1). But lawyers familiar with conveyancing need not necessarily disdain to read it, because it contains much sound practical advice outside the sphere of law, in chapters entitled "The Choice of a House, Structural Condition and Repair and Moving into a House," on points many of which are common sense but only too easily overlooked.

Especial attention is paid to the problems of the person purchasing for the first time, the financial implications of ownership and mortgaging, as opposed to renting, being carefully considered, with examples and tables of costs, stamp duty, etc. The various stages of purchase and sale, from negotiation (where the problem of estate agents' commission is clearly explained) to completion are discussed in outline, with due emphasis on planning.

The need for professional advice from surveyors and solicitors is frequently stated, though the remarks that it is "advantageous" (Preface, p. 1) and "very desirable" (p. 91) to employ a solicitor in the initial stages might well be more strongly worded. The short statement on the legal implication of mortgages (pp. 70–71) should, it is suggested, be reworded so as to distinguish more clearly between the normal course of events and the situation if the mortgagee has to call in his loan or realise his security.

Buying or Selling your House (Daily Mail Ideal Home Series No. 1, 112 pp. price 2s. 6d.) is another booklet covering the same ground in much the same way and although it is the work of several hands there is little overlapping except perhaps on the question of finance. Solicitors will be glad to see the particular importance attached to their advice and work.

Both these publications should be most useful.

F. R. C.

THE INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS. 1954. Vol. III. Published in India. [For sale by Stevens & Sons, Ltd., London. ix and 454 pp. 20s.]

THIS third volume follows the pattern set in previous volumes. The first section includes a wide range of topics dealing with problems of particular relevance to India and other Asian nations; some are of mainly historical interest, others deal with current economic, political, and even cultural relations. The second section is perhaps of more immediate interest to readers of this Journal and deals with problems of international law and constitutional law, concluding with a summary of recent treaties and case decisions.

In this second section the articles are extremely varied and include topics such as "Grotius and India," "The Judiciary in Pakistan," "Constitutional Problems of the Colombo Powers," and several articles on international law. An article on "The Right to Learn" by L. C. Green contains a useful survey of the recent American decisions together with a comparison between these decisions and recent Indian decisions. The current problem of "The Narrowing Sea" is the subject of an article which analyses the relationship between the I. C. J. decision in the *Anglo-Norwegian Fisheries* case and the International Law Commission's draft on Territorial Waters, and points out possible inconsistencies beween the two.

There is in this volume far less evidence of "partisanship" and far more of

independent scholarship. Occasionally, where authors touch questions of acute political sensitivity, there is a surprising omission of relevant facts and, on one occasion, a complete distortion of the facts. For example, in dealing with "China and the United Nations," Mr. Singh rightly points out that the exclusion of Communist China from representation in the UN organs in effect virtually terminates China's membership; but in dealing with the merits of the claim to representation there is no mention of the fact, by some considered extremely relevant, that that government has been found guilty of aggression against the United Nations by the General Assembly. It is not suggested that this ought to be a vital factor either way, but it is surely one which demands attention.

Again, in a somewhat factual article on "The Problem of Korea" by L. M., after recounting how the UN Command had reported hostile contact with Chinese "volunteers" on Nov. 5, 1950, the author states that "The UN forces began an offensive against the Chinese on Nov. 24, but when the Chinese forces launched a major counter-offensive . . . etc." (p. 198). Whether or not these terms are accurate in the military sense, to describe the Chinese intervention as a "counter-offensive" and to couple this with a forceful deprecation of the General Assembly's description of that same intervention as "aggression" seems to indicate an end to scholarship and a marked political bias.

These lapses from an otherwise general and commendable standard are unfortunate: they hinder the Yearbook's accession to the ranks of those Yearbooks to which scholars everywhere owe so great a debt of gratitude.

D. W. Bowett.

Notable British Trials Series. Vol. 80: The Trial of John Thomas Straffen. Edited by Letitia Fairfield, C.B.E., M.D., Barrister-at-Law, and Eric P. Fullbrook, Clerk to the Justices, Reading County. [London: William Hodge. 1954. xiii and 299 pp. 15s.] Vol. 81: Trial of Christopher Craig and Derek William Bentley. Edited by H. Montgomery Hyde, M.P., Barrister-at-Law. [London: William Hodge. 1954. xi and 264 pp. 15s.]

The two trials which form the latest addition to the *Notable British Trials Series* both rightly caused uneasiness among considerable sections of the public with the present situation of the criminal law, though for rather different reasons. In the *Straffen* case we are faced with the curious and unprecedented phenomenon that a certified mental defective, who had been found unfit to plead at one murder trial, should have been considered fit to stand trial for his life a few months later—largely, so it would seem, because he was mad enough to conceive of the ambition "to prove his innocence" of the new horrible crime which he had all too obviously committed. If nothing of exactly this kind had ever happened in English courts before, the unhappy spectacle of a person of seriously impaired mental faculties and seriously diminished responsibility being sentenced to death is, alas, by now only too familiar, and it is scant comfort to realise that there was from the outset no great likelihood of the sentence being executed.

The editors of this carefully prepared volume suggest in their introduction that "there can be little difference of opinion that the trial of John Thomas Straffen shows the urgent need for a change in the law concerning mentally defective prisoners charged with murder," especially the M'Naghten Rules. In this, one regrets to say, they are wrong. In the deplorably cursory discussion in the House of Commons of the Report of the Royal Commission on Capital Punishment, the Home Secretary seemed to have no compunction in maintaining—I am quoting *The Times* report—"that no advantage would

be gained by disturbing the present position, and that it was better to leave matters as they were."

The outcome of the *Craig-Bentley* case also has the unenviable distinction of creating a precedent, for if Bentley, himself in his 'teens, was not by a long shot the first, nor, one fears, the last dim-witted boy to be hanged in this country, he appears to be the first individual in our legal history who has been executed as an accomplice in a crime for which the principal instigator and chief executant could not suffer the extreme penalty on account of age.

The crimes reported in these two volumes were plainly of a particularly repulsive and heinous character. It is just in these cases, where strong feeling is likely to be aroused among all concerned, that every possible care must be taken that the conduct of the case throughout should be as unimpeachable as is humanly possible. In the circumstances one notes from statements made at the Craig-Bentley trial that, after the crime had been committed around 9.30 p.m., and Bentley was arrested and taken to the police station immediately afterwards, it was 4 a.m. or a little later when he made an important and lengthy statement in the chief inspector's room, and about 5.30 a.m. the same night when he was seen again, charged and cautioned. One is left to wonder what happened in the intervening hours of the night.

Other unusual features of this same trial, which become obvious from the transcript now published in the *Notable British Trials Series*, included the spectacle, unfamiliar in an English court, of the judge, in this case the Lord Chief Justice, in his summing-up, brandishing and demonstrating to the jury an implement in no way used in the commission of the crime charged against the prisoners, with the rhetorical question: "Have you ever seen a more horrible sort of weapon?" and the final words of the court in passing sentence on Craig: "I shall recommend the time which I suggest to the Secretary of State that you shall be kept in confinement."

H. A. Hammelmann.

Books and Publications Received

Annales Universitatis Mariae Curie-Sklodowska. Section G-Ius. Vol. II, 1955. Lublin.

Justicia y Sentido. Miguel Herrera Figueroa. Prólogo del Profesor Dr. Werner Goldschmidt. [Facultad de Derecho y Ciencias Sociales. Universidad Nacional de Tucuman. 1955.]

Soviet Legal Bulletin. Vol. 2, No. 1. March, 1955. Soviet Criminal Law and Procedure. By Dudley Collard. Vol. 2, No. 2. August, 1955. Procuracy in the Soviet Union. By D. N. Pritt, Q.C. Soviet Procurators' Conference. Vol. 2, No. 3. October, 1955. Some Aspects of Legal Education in the U.S.S.R. By E. L. Johnson. [Society for Cultural Relations with the U.S.S.R., 14 Kensington Square, London W. 8. 1s. 6d. postage 3d.]

Manuel López-Rey Arrojo. Cuestiones Penologicas. [Editorial Richardet. Tucuman-Argentina. Calle Buenos Aires 31. 1955. 90 pp.]